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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF OREGON
6 PORTLAND DIVISION

7 HENRIETTA WERTHY,)
8)
9 Plaintiff,) No. 03:10-cv-00324-HU
10 vs.)
11 MICHAEL J. ASTRUE,) **FINDINGS AND RECOMMENDATION**
12 Commissioner of Social Security,)
13 Defendant.)

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1 - FINDINGS AND RECOMMENDATIONS

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17 Hubel, United States Magistrate Judge:

18 The plaintiff Henrietta Werthy seeks judicial review pursuant
19 to 42 U.S.C. § 405(g) of the Commissioner's final decision denying
20 her application for Supplemental Security Income ("SSI") under
21 Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*
22 Werthy argues the Administrative Law Judge ("ALJ") erred in finding
23 many of her impairments not to be "severe"; finding she retains the
24 residual functional capacity to work; presenting an improper
25 hypothetical question to the Vocational Expert; and ignoring
26 relevant evidence regarding the numbers of available jobs. See
27 Dkt. #1.

I. PROCEDURAL BACKGROUND

Werthy protectively filed her application for benefits on April 22, 2005, at age 45, claiming a disability onset date of January 1, 1993.¹ (A.R. 18, 70-72; see A.R. 692) Her application was denied initially and on reconsideration. (A.R. 45, 46, 52-60) She requested a hearing (A.R. 61), and a hearing was convened on February 26, 2008, before an ALJ. (A.R. 682-94) Werthy was represented by an attorney at the hearing, and a Vocational Expert ("VE") also appeared at the hearing. No testimony was taken at the hearing, which consisted only of colloquy between the ALJ and Werthy's attorney. The ALJ directed the attorney to obtain certain additional evidence that was missing from Werthy's medical records, and the hearing was adjourned and reconvened on July 14, 2008. (A.R. 634-81) Werthy again was represented by counsel, and she testified on her own behalf. A VE and a medical expert ("ME") also testified at the hearing. *Id.*

On August 14, 2008, the ALJ issued her decision, finding that although Werthy's "neck and back pain," in combination, are severe impairments (A.R. 20), they do not meet the Listing level of

¹Werthy filed a prior application for SSI benefits on January 15, 2004, alleging a disability onset date of August 25, 1993. (A.R. 67-69) The application was denied on April 28, 2004. (A.R. 47-51) Werthy did not appeal.

Interestingly, both Werthy's attorney and the Commissioner's attorney state, in their clients' briefs, that Werthy's alleged disability onset date in connection with the application under review is August 25, 1993. See Dkt. #15, p. 4 (citing A.R. 70, 113); Dkt. #18, p. 2 (citing A.R. 70). Page 70 of the Administrative Record, cited by both parties, lists the correct January 1, 1993, alleged onset date. Page 113 of the record, cited by Werthy's counsel, is a Disability Report in connection with Werthy's prior application for benefits. The correct disability onset date alleged in the present action is January 1, 1993. See A.R. 70, 692.

1 severity. The ALJ further found that although Werthy does not
 2 retain the residual functional capacity to perform her past
 3 relevant work as a home care giver, she is able to perform other
 4 semi-skilled and unskilled jobs that exist in significant numbers
 5 in the national economy. (A.R. 20-26) Werthy appealed the ALJ's
 6 decision, and on February 4, 2010, the Appeals Council denied her
 7 request for review, making the ALJ's decision the final decision of
 8 the Commissioner. (A.R. 6-8)

9 Werthy filed a timely Complaint in this court, seeking
 10 judicial review of the Commissioner's final decision. Dkt. #2.
 11 The matter is fully briefed, and I submit the following Findings
 12 and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).
 13

14 **II. FACTUAL BACKGROUND**

15 **A. Summary of the Medical Evidence**

16 **1. Consultants' Reports**

17 Werthy saw James B. Powell, Psy.D. on August 16 and 28, 2001,
 18 apparently for a consultative mental status evaluation.² (A.R.
 19 486-95) Werthy stated that ever since her accident on August 25,
 20 1993, she had been unable to "lift at all" and she was unable to
 21 "sit or stand for a long time." (A.R. 486) She reported being
 22 forgetful at times, having four or more headaches a week, and
 23 having neck and lower back pain "all the time." (*Id.*) She
 24 indicated her doctors had been unable to find a cause for her
 25 ongoing pain. She also stated she had been experiencing depression
 26

27 ²Page 1 of the eleven-page report is missing, which would have
 28 stated the reason for the evaluation and listed the referring
 agency - likely the state disability determination service.

1 "real bad" for two years, describing symptoms of excessive
2 sleeping, increased irritability, and "a bad attitude." (*Id.*)³

3 Werthy described daily activities such as helping her mother
4 care for two young girls, playing the piano or guitar, and doing
5 household chores. She indicated that when she did housework, she
6 had to sit down and rest for twenty minutes after only a short time
7 before she could continue. She stated her mother helped her fold
8 clothes, and also helped her keep her living area clean. She
9 sometimes needed her mother's assistance to put on pants,
10 especially during cooler weather. She did her own shopping and
11 cooking, but she had to take rest breaks during meal preparation
12 and she often used a microwave. She stated she quit driving due to
13 her back and neck problems. (A.R. 486-87) She also stated she had
14 stopped working due to back and neck problems following her 1993
15 accident. (A.R. 487)

16 Dr. Powell administered the Wechsler Adult Intelligence Scale
17 - Third Edition (WAIS-III), on which Werthy "obtained a full Scale
18 IQ Score and Performance IQ Score of 75, which is at the 5th
19 percentile and falls within the Borderline (Well Below Average)
20 range when compared with other adults between the ages of 35 and
21 44." (A.R. 490) Her Verbal IQ Score was 78, which also is in the
22 Borderline range. (*Id.*)

23 Dr. Powell also administered the Minnesota Multiphasic
24 Personality Inventory-2 (MMPI-2), the results of which he found to
25

26 ³Werthy also discussed a history of fibroid tumors, and the
27 record contains numerous progress notes regarding Werthy's
28 menstrual problems, endometriosis, and desire to become pregnant.
The court has omitted any discussion of these problems which are
unrelated to Werthy's claim that she is disabled.

1 be "generally a valid representation of the clinical profile of
2 this client." (A.R. 491) He noted the following regarding
3 Werthy's results on the MMPI-2:

4 In considering the score configurations, these
5 individuals tend to focus to a great extent
6 on various somatic and physical problems.
7 Often, these physical symptoms may be more
8 nonspecific and vague and may include back-
9 aches or gastrointestinal symptoms. Even
10 though these scales cannot reliably be used to
11 distinguish between a functional disorder and
12 an actual physical disease, in any event,
13 these individuals often have a tendency to
14 convert psychological stress into somatic and
15 physical symptoms. They also may be experi-
16 encing a mild to moderate level of emotional
17 distress, which may be characterized by
18 tension, anxiety and dysphoria. They may
19 experience an increased level of frustration
20 and irritability. These individuals also may
21 report having concentration difficulties and
22 may show a tendency to process information in
23 a rather concrete manner. These individuals
24 also may feel rather alienated from other
25 people. They also may struggle with having a
26 lack of drive.

16 (A.R. 492)

17 Dr. Powell's diagnostic impressions included "Major depressive
18 disorder, recurrent, moderate"; "Pain disorder, associated with
19 psychological features, provisional. Continue to rule out whether
20 or not there is the presence of a general medical condition.";
21 alcohol and cocaine abuse, in sustained full remission per Werthy's
22 report; "Borderline intellectual functioning, mainly based upon
23 current test results. Client's reported history would seem to
24 indicate a relatively higher level of intellectual functioning."
25 (*Id.*) He estimated Werthy's current GAF at 58.⁴

27 ⁴A GAF of 58 indicates moderate symptoms. See *Raegen ex rel.*
28 *Syzonenko v. Astrue*, slip op., No. 10-CV-401-BR, 2011 WL 1756131 at
*5 n.3 (D. Or. May 9, 2011) (citing DSM-IV at 31-34).

1 Dr. Powell concluded Werthy likely had been "experiencing
2 symptoms that [were] consistent with at least a moderate level of
3 clinical depression. Her reported psychological symptoms
4 appear[ed] to be secondary to her reported medical and physical
5 condition." (A.R. 493) He opined Werthy had a pain disorder, but
6 noted that no formal medical diagnosis had been made, and he
7 suggested "further medical evaluation should be undertaken to
8 determine what actual physiological or medical conditions may
9 exist." (*Id.*) He indicated Werthy's psychological symptoms
10 included "prolonged periods of dysphoria and a depressed mood and
11 an increased level of irritability, . . . [and] an increased level
12 of isolation from others." (*Id.*) He noted Werthy had "rather
13 limited" reading skills; "adequate" vocabulary, immediate attention
14 span, and nonverbal logical reasoning and analytical skills; and
15 some concentration difficulties. (*Id.*)

16 Dr. Powell opined that Werthy's primary obstacle to employment
17 would be her neck and back pain. From a psychological standpoint,
18 he indicated, "It is likely that symptoms of depression may
19 interfere in the sense that she may struggle to have an adequate
20 level of drive in pursuing activities that would help her be more
21 independent." (A.R. 494) However, he further noted that Werthy's
22 symptoms of depression were not "at such a level of severity as to
23 hinder [her] from at least taking more active steps in pursuing
24 future work activity." (*Id.*) He found Werthy's prognosis for
25 being able to return to work in the future to be "good at this
26 time, but will largely depend upon her compliance with treatment
27 recommendations and the resolution of the symptoms of pain that she
28 has identified." (*Id.*) He opined that the longer Werthy remained

1 inactive, the more her dependence on others would increase. (A.R.
2 495)

3 On December 3, 2001, Sharon Eder, M.D., a specialist in
4 Internal Medicine, reviewed the record and completed a Residual
5 Physical Functional Capacity Assessment form. (A.R. 349-54) She
6 opined Werthy could lift/carry up to twenty pounds occasionally and
7 ten pounds frequently; sit and stand/walk for up to six hours each
8 in an eight-hour workday; push/pull without limitation; stoop and
9 crouch occasionally; and perform all other postural activities
10 (e.g., climbing and balancing) frequently. She found Werthy to
11 have no other limitations on her physical capacity to work. *Id.*
12 On December 21, 2009, consultant John M. Pesado, M.D. (specialty
13 unknown) reviewed the record and agreed with all of Dr. Eder's
14 findings. (A.R. 375)

15 Also on December 3, 2001, a DDS consultant (whose name is
16 illegible in the record and whose specialty is unknown) completed
17 a Mental Residual Functional Capacity Assessment form (A.R. 355-
18 58), and a Psychiatric Review Technique form (A.R. 359-72). The
19 consultant found Werthy to have borderline intellectual
20 functioning, recurrent depression, and a substance addiction
21 disorder in remission per Werthy's report. (A.R. 359, 360, 362,
22 367) He opined these impairments would cause moderate limitations
23 in Werthy's ability to maintain social functioning, and mild
24 limitation in her ability to maintain concentration, persistence,
25 or pace. (A.R. 369) He indicated she likely would be moderately
26 limited in her ability to understand, remember, and carry out
27 detailed instructions; to interact appropriately with the general
28 public; and to set realistic goals or make plans independently of

1 others. (A.R. 355-56) He opined she would not be significantly
2 limited due to mental impairments in any other area of functioning.
3 *Id.*

4 In the consultant's notes, he indicated he had reviewed a form
5 completed by Werthy where she stated she "takes Trazodone for
6 sleep, has had 'real bad depression for past 2 yrs, excessive
7 sleeping, increased irritability, bad attitude.'" (A.R. 371) He
8 summarized Werthy's daily activities as follows:

9 She helps her mother babysit (taking kids to
10 park & playing w/them), spends time playing
11 the piano or guitar, sometimes plays on the
12 computer, reads the Bible, does household
chores, cares for her hygiene & grooming,
shops, cooks, uses public transp[ortation],
prefers to stay by self, has a boyfriend.

13 (*Id.*) The consultant found Werthy's episodes of depression to be
14 linked to her medical condition. He noted she has a history "of
15 chronic neck & back pain, [and] fibroid tumors." (*Id.*) On
16 December 26, 2001, psychiatrist C.S. Dagadakis, M.D. reviewed
17 record and agreed with all of the DDS consultant's findings. (A.R.
18 373-77)

19 On September 16, 2002, an unidentified consultant reviewed the
20 record and completed a Psychiatric Review Technique form. (A.R.
21 380-93) The consultant's findings were virtually identical to
22 those of the DDS consultant in December 2001. (*Compare id. with*
23 *A.R. 359-72*)

24 On November 12, 2002, Werthy was seen by psychologist Paul
25 Brown, Ph.D. for a consultative mental status evaluation. (A.R.
26 524-29) She "denie[d] having any mental health problems" and
27 "state[d] that her mental health reasons for filing for disability
28 [were] 'not applicable.'" (A.R. 524) Dr. Brown noted Werthy was

1 "quite cooperative," talkative, "open and friendly." (A.R. 527)
2 Her thoughts were logical and well organized, and her memory was
3 good. He noted Werthy's "intelligence by record is borderline with
4 a full scale score of 75 but her memory and her general knowledge
5 and her ability to reason seem much higher than this." (*Id.*) He
6 diagnosed Werthy with Depression NOS, history of substance abuse in
7 remission, "[r]ule out manic episodes possible cyclothymic
8 condition," "[b]orderline intellectual functioning by record but
9 her performance seems superior to this." (A.R. 528) He estimated
10 her prognosis to be "guarded," noting medications might improve her
11 pain and depression somewhat. He further noted, "She has some good
12 stable qualities even though she is very dependent upon her mother
13 and might be able to return to work as she has some work history
14 and is competent in her thinking being very logical." (*Id.*)

15 Dr. Brown further noted that if Werthy was awarded benefits,
16 there was some question whether she could manage her own funds due
17 to a "quite poor" ability with numbers. (*Id.*) Werthy stated that
18 due to her pain, she could not lift more than two pounds or walk
19 for any distance. However, Dr. Brown noted she was able to sit
20 during the fifty-minute interview "without any noticeable pain
21 behavior." (A.R. 529) He opined Werthy could interact well with
22 coworkers and the public. Werthy stated she wanted to return to
23 work and Dr. Brown noted "this might be possible." (*Id.*)

24 On February 4, 2003, Linda Jensen, M.D., a Physical Medicine
25 and Rehabilitation specialist, reviewed the record and completed a
26 Physical Residual Functional Capacity Assessment form. (A.R. 395-
27 400) She opined Werthy could lift/carry up to twenty pounds
28 occasionally and ten pounds frequently; sit/stand and walk, each,

1 for about six hours in an eight-hour workday; push-pull without
 2 limitation; and perform all types of postural activities
 3 occasionally, except she could balance frequently. (A.R. 396-97)
 4 Although she found Werthy's symptoms were attributable to a
 5 medically-determinable impairment, she found the severity of the
 6 symptoms to be disproportionate to the expected severity or
 7 duration based on Werthy's medically-determinable impairments.
 8 (A.R. 398)

9 Dr. Jensen indicated Werthy was forty-three years old, 60"
 10 tall,⁵ and weighed 210 pounds. Werthy alleged back pain since an
 11 accident in 1993, when a bus in which she was a passenger was
 12 struck by another vehicle. Her medical problems as of August 2002
 13 were noted to be "chronic back pain, arthritis, CAT scan lumbar
 14 spine, DJD with disc protrusion, impingement, connective disc
 15 disease, L-4-5, obesity." (A.R. 399) A back fusion had been
 16 recommended, but notes indicate Werthy preferred "to take herbs,
 17 does not want surg[ery]." *Id.* Dr. Jensen noted prior consultants
 18 had found Werthy's complaints to be consistent, and her statements
 19 to be credible. Dr. Jensen expressly disagreed with the consis-
 20 tency assessment, finding as follows:

21 Per the psych [consultative evaluation],
 22 claimant stopped all her medications, although
 23 she was planning on restarting them. She has
 24 advanced L45 [degenerative disc disease] with
 25 small protrusion, but no consistent radicular
 26 findings. There are some inconsistencies re
 function, e.g., sat comfortably through psych
 eval although she indicates sitting is a
 problem. The [Primary Care Physician] opines
 on 9-29-02 no work until eval'd for surgery.
 However, there's nothing to indicate a

27 ⁵The SSA records later indicate Werthy is 70" tall. (A.R.
 28 426)

1 referral for a surgeon's opinion, it is not in
2 functional terms, the claimant was to follow-
3 up on this in one week but it looks like only
4 medication samples were given.

5 (*Id.*) Overall, Dr. Jensen agreed with the RFC limitations set
6 forth by the previous consultants. (*Id.*)

7 On April 7, 2004, Werthy saw Kim Webster, M.D., a family
8 practitioner, for a consultative physical examination. (A.R. 592-
9 95) Dr. Webster noted Werthy had a "very unusual" affect, and her
10 behavior led the doctor to believe Werthy "may be retarded." (A.R.
11 593) Werthy got on and of the examination table, and removed and
12 replaced her shoes, easily. On examination, Werthy was noted to be
13 70" tall, weighing 205 pounds. She had good muscle tone and
14 strength, and good ranges of motion of her joints. Straight-leg-
15 raising was negative. Dr. Webster found no evidence of neurologic
16 dysfunction to explain Werthy's neck and low back pain following
17 her "minuscule trauma many, many years ago[.]" (A.R. 595) She
18 found no objective evidence of "any disability in her standing,
19 walking, sitting, lifting, carrying, hearing, speaking, handling
20 objects, or her ability to travel. The doctor further noted there
21 was "some question about [Werthy's] mental status." (*Id.*)

22 On April 23, 2004, psychologist Dorothy Anderson, Ph.D.
23 reviewed the record and completed a Psychiatric Review Technique
24 form (A.R. 402-15), and a Mental Residual Functional Capacity
25 Assessment form (A.R. 416-19). She opined Werthy would have mild
26 functional limitations in restriction of the activities of daily
27 living and difficulties in maintaining social functions, and
28 moderate functional limitations in her ability to maintain
concentration, persistence, or pace. (A.R. 412) She opined Werthy

1 would be moderately limited in her ability to understand, remember,
 2 and carry out detailed instructions; to interact appropriately with
 3 the general public; and to accept instructions and respond
 4 appropriately to criticism from supervisors. She indicated Werthy
 5 otherwise would have no significant limitations based on the
 6 evidence of record. (A.R. 416-17) She noted Werthy would "require
 7 an understanding, supportive supervisor, but not special
 8 supervision." (A.R. 418)

9 On April 27, 2004, a medical consultant (name illegible and
 10 specialty unknown) reviewed the record and completed a Residual
 11 Physical Functional Capacity Assessment form. (A.R. 420-24) The
 12 consultant's findings were consistent with those from Dr. Jensen's
 13 February 2003 RFC assessment.

14 In a "Physical Summary" at the time Werthy's application was
 15 reconsidered, Dr. Eder observed the following from the record
 16 evidence:

17 File back on recon[sideration], [Werthy]
 18 alleges neck, back, legs, hands, feet, arms,
 19 hips, shoulder pain. She has [degenerative
 20 disc disease] in the lumbar and cervical
 21 spines. She is obese at 70" 243#, gait is
 22 normal, station is normal. On exam she is
 23 fairly histrionic, good balance, she has some
 24 decreased [range of motion]. She has good
 25 muscle bulk, tone and strength. She has good
 26 strong abduction at the shoulders, she can
 27 squat and recover. Motor strength is 5/5,
 28 sensation normal, reflexes are zero at the
 ankles, the knees, and +1 at the biceps and
 zero at the triceps. Essentially a normal
 neuromuscular exam with fairly odd symptoms
 and positive Waddell sign.⁶ She gives a

26
 27 ⁶"Waddell's signs were developed to identify psychogenic, or
 28 nonorganic, manifestations of pain in patients that may have
 heightened emotional effects on their condition." *Physiopedia*,
http://www.physio-pedia.com/index.php5?title=Waddells_Sign (visited

1 totally different account of her [activities
2 of daily living] on physical exam compared
3 with psych exam where she reports she
4 essentially runs the household [and] cares for
her cousins and her ill mother. Her credi-
bility is questionable; but we can affirm our
earlier light RFC.

5 (A.R. 426)

6 On July 12, 2005, Werthy saw psychiatrist Nancy Cloak, M.D.
7 for a comprehensive psychiatric examination. (A.R. 597-601)
8 Werthy was noted to be "cooperative and a reliable historian."
9 (A.R. 597) Werthy described her activities of daily living as
10 follows:

11 On a typical day, she will find it very
12 difficult[] to get out of bed and to shower,
13 but on most days, is able to do the latter.
14 This is followed by watching television,
15 taking medication, and in the afternoon
16 walking with her boyfriend to the park. She
17 also participates when she is feeling better
in housework, meal preparation, and watching
her young cousins. She is independent with
respect to meals, finances, shopping, trans-
portation, and housework. Though she states
at times her pain interferes with these.

18 (A.R. 598) Dr. Cloak noted that when Werthy was called from the
19 waiting area for her appointment, "she moved with a slow, antalgic
20 gait, and sat stiffly initially. However, as the interview
21 progressed and she became more involved with her story, much of the
22 pain behavior disappeared, except that she stood up approximately
23 20 minutes into the interview, stating that she was uncomfortable
24 sitting down." (A.R. 599) Werthy was noted to be "quite
25 preoccupied with her pain." (*Id.*)
26

27
28 Sept. 1, 2011).

15 - FINDINGS AND RECOMMENDATIONS

1 The doctor noted Werthy's "objective presentation was
 2 inconsistent with depression, in that both her physical appearance
 3 and her bright affect as well as the considerable energy she put
 4 into expressing her feelings about her pain, were inconsistent with
 5 her history of profound fatigue." (A.R. 600) The doctor did,
 6 however, note objectively that Werthy had difficulty concentrating.
 7 She diagnosed Werthy with "Adjustment disorder with depressed mood,
 8 chronic"; "Cocaine and alcohol dependence in full sustained
 9 remission"; "Pain disorder"; and "Chronic neck and back pain."
 10 (*Id.*) She estimated Werthy's current GAF at 65.⁷ She noted the
 11 following conclusion regarding Werthy's mental functional
 12 abilities:

13 The claimant is capable of managing her Social
 14 Security funds[, if they are awarded], based
 15 on generally intact judgment and cognitive
 16 functioning. She is capable of understanding
 17 and remembering instructions, sustaining
 18 concentration and attention, and engaging in
 appropriate social interactions. There do not
 appear to be any psychiatric limitations to
 effective job performance, although certain
 tasks may be limited by her chronic pain.

19 (A.R. 600-01)

20 On July 13, 2005, Werthy saw Kim Webster, M.D. for a repeat
 21 consultative physical examination. (A.R. 602-06) Werthy's chief
 22 complaints were noted to be low back pain, neck pain, and diffuse
 23 myalgias/arthralgias. (A.R. 602) Werthy was noted to have "a very

24
 25 ⁷A GAF "between 60 and 70 indicates a patient with 'some mild
 26 symptoms' or 'some difficulty in social, occupational, or school
 27 functioning,' but who is 'generally functioning pretty well, [and]
 28 has some meaningful interpersonal relationships.'" *Vasquez v.*
Astrue, 572 F.3d 586, 594 n.6 (9th Cir. 2009) (quoting *Am. Psych.*
Ass'n, Diagnostic and Statistical Manual of Mental Disorders at 34
 (4th ed. Text Revision 2000)).

1 child-like affect and speech pattern." (A.R. 603) Dr. Webster
2 noted the following observation of Werthy's behavior during the
3 examination:

4 [S]he would say, "Ouch" probably 2-4 times per
5 minute. This was said with a very flat affect
6 with no wincing. She would say it sitting or
7 standing perfectly still and nothing really
happened, but she would just say "ouch."
There was a fair amount of pain behavior.
There were inconsistencies and poor effort.

8 (*Id.*) On examination, Werthy was noted to be 70" tall, weighing
9 243 pounds. Straight-leg-raising was positive at 30 degrees when
10 Werthy was supine, but no discomfort at 90 degrees when sitting.
11 Her ranges of motion were good, gait was normal, and she had fairly
12 good balance and coordination. She also had good muscle tone and
13 strength. Dr. Webster's assessment was "Low back pain with a
14 normal neuromuscular examination, fairly odd symptoms, and positive
15 Waddell sign, strongly suggesting a non-organic cause of pain";
16 "Neck pain with a normal neuromuscular examination"; "Diffuse
17 myalgias and arthralgias with a normal musculoskeletal
18 examination"; "Anxiety"; and "Morbid obesity." (A.R. 605) The
19 doctor found "no objective evidence that would limit [Werthy's]
20 ability to stand, walk, sit, lift, or carry occasionally or
21 frequently." (*Id.*) She further found no objective evidence that
22 Werthy would need an assistive device, or that she would have any
23 postural, manipulative, or environmental restrictions. (A.R. 605-
24 06)

25 On August 10, 2005, psychologist Bill Hennings, Ph.D. reviewed
26 the record and completed a Psychiatric Review Technique form.
27 (A.R. 435-48) His diagnostic impressions included borderline
28 intellectual functioning, an adjustment disorder, a pain disorder,

1 and a history of drug abuse. He opined Werthy would have moderate
2 limitations in her ability to maintain social functioning and to
3 maintain concentration, persistence, or pace; and mild limitation
4 in restriction of her activities of daily living. Dr. Hennings
5 also completed a Mental Residual Functional Capacity Assessment
6 form (A.R. 450-53). He opined Werthy would be moderately limited
7 in her ability to understand, remember, and carry out detailed
8 instructions; to maintain attention and concentration for extended
9 periods; to interact appropriately with the general public; and to
10 set realistic goals or make plans independently of others. (*Id.*)
11 He otherwise found Werthy to have no mental work-related
12 limitations. (*Id.*)

13 On August 11, 2005, Martin Kehrli, M.D., a Physical Medicine
14 and Rehabilitation specialist, reviewed the record and completed a
15 Physical Residual Functional Capacity Assessment form. (A.R. 427-
16 34) His findings were consistent with prior assessments. Dr.
17 Kehrli noted the record evidence contains inconsistencies in
18 Werthy's "report of function and noted pain behavior and over
19 dramatized presentation." (A.R. 432) He agreed she does have
20 degenerative disc disease of her neck and back, but her report,
21 presentation, and pain behaviors outweigh the overall severity of
22 her condition. He indicated her ability to perform complex tasks
23 would be affected by her ability to concentrate. *Id.*

24 On December 6, 2005, psychologist Paul Rethinger, Ph.D. noted
25 Werthy has "borderline IQs with some depression." (A.R. 449) He
26 noted the record evidence indicates Werthy cares for her two
27 younger cousins, shops, cooks, cleans, uses the bus, reads her
28 Bible, assists her ill mother, handles necessary household chores,

1 and is independent in caring for herself. She has "somewhat
2 restricted" short-term memory, but her long term memory is good.
3 *Id.*

4
5 **2. Werthy's medical records**

6 The record contains no mention of medical treatment for
7 Werthy's 1993 accident. Indeed, the earliest treatment notes in
8 the record are from August 5, 1999, when Werthy saw a doctor
9 complaining of numbness along the lateral aspect of her right thigh
10 and calf, going into her foot. She stated the numbness had started
11 about two weeks earlier. Her other symptoms of pain in her low
12 back, neck, and shoulders were listed as "unchanged" since her last
13 exam. Notes indicate Werthy "wants disability" for her condition.
14 (A.R. 480) Prescriptions for trazodone and nortriptyline were
15 refilled, and she was started on a trial of 600 mg of Ibuprofen
16 three times daily. (*Id.*)

17 Werthy was seen on September 9, 1999, complaining of chronic
18 pain with minimal or unchanged neurological symptoms. Her upper
19 extremity and neck pain were better, but she continued to have low
20 back pain with no radicular symptoms. She described occasional
21 numbness and tingling. She stated her pain was "still there," but
22 she was dealing with it better. She was given refills for
23 trazodone, nortriptyline, and ibuprofen. (A.R. 478) In addition,
24 notes indicate Werthy was going to send the doctor her "disability
25 paperwork" for review, but the doctor expressed "doubt [that] she
26 really needs this." (A.R. 479)

1 On October 25, 1999, Werthy was seen for followup of her
2 chronic pain.⁸ She had run out of her medications about a week-
3 and-a-half earlier, and her pain had increased since then. The
4 doctor noted "no consistent objective neurological [findings,]" but
5 he did note the presence of "multiple tender points throughout."
6 (A.R. 475) He prescribed trazodone 100 mg and nortriptyline 75 mg
7 at bedtime, and NSAIDS as needed. (*Id.*)

8 On December 2, 1999, Werthy was noted to be "much less tender
9 in her prior tender points [and] neurologically normal today."
10 (A.R. 470) Her chronic pain was "much improved on trazodone and
11 nortriptyline." (*Id.*) Notes indicate Werthy's pain and depression
12 were well controlled on the medications, but she had flares of pain
13 with associated emotional lability if she went off her medications
14 even for a short time. Notes further indicate her depression and
15 anxiety had a definite correlation with her chronic pain. (A.R.
16 473, 474)

17 Werthy was seen on January 6, 2000, for followup of her
18 chronic pain. Notes indicate she was "[a]ctually doing remarkably
19 well and tolerating meds." (A.R. 471) She was learning to live
20 with her pain and learning coping strategies. She had begun an
21 exercise program and indicated she might soon have a part-time job.
22 (*Id.*)

23
24
25
26 ⁸In many cases, the court is unable to determine who Werthy
27 saw for treatment, or whether the individual was a doctor,
28 physician's assistant, nurse practitioner, or other medical
professional. She often was seen in a multi-disciplinary clinic in
the Legacy Health System, and the treating person's name or
initials are illegible or nonexistent.

1 Werthy was seen on April 6, 2000, for followup of her chronic
2 pain. Her condition was noted to be "reasonably stable" and her
3 depression was "well controlled." She stated she wanted to get a
4 job, and she was approved for part-time work with lighter-type
5 duties. Notes indicate Werthy had "learned to live with pain."
6 Her dosage of nortriptyline was increased to 100 mg. (A.R. 464-65)
7 Werthy was seen on April 27, 2000, for followup of her chronic
8 pain. The record does not indicate if, or how, she was treated.
9 (A.R. 463)

10 On July 31, 2000, Werthy's treating physician's office spoke
11 with her caseworker at "Lifecenter." Notes indicate Werthy had
12 "tried doing simple tasks at Lifecenter - hanging clothes, etc.,"
13 but she had multiple pain complaints after a few hours. Her case
14 worker indicated "disability not likely indicated" and "maintaining
15 function is key to management of chronic pain." (A.R. 463) Werthy
16 apparently had been utilizing Lifecenter's services less recently,
17 which was noted to be "possibly a good sign." (*Id.*) Notes further
18 indicate, "doubt there is any indication for . . . disability."
19 (*Id.*)

20 Werthy was seen on August 8, 2000, with a complaint of back
21 and neck pain, which she stated had been present since 1993. She
22 was seen for followup on August 24, 2000, but notes do not indicate
23 if, or how, she was treated. (A.R. 462) She missed a scheduled
24 appointment on September 7, 2000, when she was scheduled to be seen
25 "for back pain." (*Id.*)

26 Werthy saw a doctor on October 30, 2000, for followup of a
27 "cracked rib/back/neck injury" from a motor vehicle accident.
28 She had suffered a rib strain after being involved in an alter-

1 cation on October 30, 2000. Her "chronic pain issues" were noted
2 to be "stable" and she was "functional." (A.R. 455) Her medica-
3 tions for chronic pain were continued without change. (A.R. 456)

4 On April 2, 2001, Werthy saw a doctor to get established as a
5 new patient. She completed a "Review of Systems" form on which she
6 indicated she had stress and depression stemming from her ongoing
7 back pain and menstrual bleeding problems, but she had no other
8 health problems or concerns. (A.R. 512) Werthy returned for an
9 annual physical examination on May 7, 2001, and her depression was
10 noted to be "stable" on her current medications. (A.R. 509)
11 Regarding her chronic lower back pain, she was continued on NSAIDS
12 at night, and she was given information on "stretching, back
13 health, [and an] exercise regime[.]" (A.R. 508)

14 On October 8, 2001, Werthy saw Robert A. Berselli, M.D., an
15 orthopedic surgeon, for consultation regarding her ongoing neck and
16 back pain. Notes indicate Werthy was 5'11" tall, and weighed 225
17 pounds. Examination revealed some restricted range of motion of
18 her neck in all directions; diffuse tenderness to palpation
19 posteriorly; moderate pain in her lumbar spine on percussion, with
20 mild, diffuse paralumbar muscle spasm, but "no real sciatic notch
21 tenderness" and normal lower extremities neurologically. (A.R.
22 566) The doctor noted, "I am not sure why the patient complains of
23 neck or back pain." (*Id.*) He ordered x-rays of Werthy's cervical
24 and lumbar spine, and planned to follow up after they were taken.
25 (*Id.*)

26 On October 23, 2001, progress notes indicate a phone
27 conversation was had with Werthy "who stated that MRI was not done
28 [because] tech thought she should have 'whole body MRI.'" (A.R.

1 506) The doctor's office spoke with the MRI tech, who stated
2 Werthy had never presented for an MRI, at least according to their
3 log. (*Id.*) Werthy's MRI was rescheduled for October 29, 2001.
4 (*Id.*) The MRI showed "[r]elatively advanced degenerative disk
5 disease . . . at L4-L5, where the disk space is narrowed and where
6 the disk material is of lower-than-normal signal intensity,
7 indicating desiccation. This is associated with a small posterior
8 disk protrusion which indents the anterior aspect of the spinal
9 canal midline and slightly toward the right." (A.R. 516)

10 On November 27, 2001, Werthy saw a doctor with continued
11 complaints of near-daily back pain, some days worse than others.
12 The doctor prescribed Relafen, and recommended weight loss and
13 exercise. (R. 502-03)

14 Werthy saw a doctor on January 7, 2002, for followup of her
15 chronic pain. She complained of daily pain that was causing
16 sleeplessness, inability to get into a comfortable position, and
17 mood swings. Notes indicate an MRI of her lumbar spine showed
18 severe degenerative disc disease with a small disk protrusion. The
19 doctor prescribed Relafen, stretching, and a weight loss plan.
20 (A.R. 500) On January 29, 2002, the doctor refilled a prescription
21 for trazodone. (*Id.*) On May 21, 2002, a doctor prescribed Tylenol
22 #3 and Relafen. (A.R. 501)

23 On June 13, 2002, Werthy saw a doctor complaining of right
24 shoulder pain, right ankle pain with bending, severe back pain that
25 sometimes awakened her at night, and a worsening of her depression
26 symptoms. The doctor prescribed weight loss, exercise, Bextra, and
27 glucosamine chondroitin. (*Id.*)

1 Werthy saw a doctor on August 29, 2002, for followup of
2 "chronic arthritis" and "severe back pain." (A.R. 498) She also
3 complained of "chronic depression." (A.R. 499) Werthy stated she
4 had "reached a point where she [could] hardly sit steady for awhile
5 or do any kind of walking or activities because of the excruciating
6 pain that she had into the lower back." (*Id.*) Her pain was
7 localized in her lumbar and lower thoracic spine. Notes indicate
8 a previous CT scan "showed degenerative disk disease with some
9 protrusion of the disk. Even though there was no specific area of
10 compression into the root nerve, the degenerative disk is quite
11 impinged with desiccation of the disk itself, which explain[s] the
12 kind [of pain] that she has with no radiation and with no
13 sciatica." (*Id.*) The doctor prescribed a trial of Bextra,
14 supplemented with Lorcet, and a continuation of trazodone for her
15 depression. She was scheduled for followup in one week, with notes
16 that if she had not improved, a repeat CT would be ordered for
17 possible surgical evaluation. She was given a note directing her
18 to refrain from any kind of physical activity for one week. (*Id.*;
19 A.R. 523)

20 On September 4, 2002, Werthy saw a doctor for followup of her
21 back and neck pain. She was given samples of Celebrex and Zoloft.
22 (A.R. 497) On September 18, 2002, she returned for followup. The
23 Celebrex, Lorcet, and Zoloft were continued, and Xanax was added
24 for her reported insomnia. In addition, an MRI of Werthy's lumbar
25 spine was ordered. (A.R. 498)

26 On October 3, 2002, at Werthy's request, she was given a
27 prescription for Valium for her MRI, which was scheduled the next
28 day. A progress note dated October 9, 2002, indicates, "Valium

1 didn't work for MRI. Needs something stronger." (A.R. 536)
2 Ativan was prescribed. (*Id.*) The next note dated October 29,
3 2002, indicates Werthy had called requesting medications again for
4 her MRI. The request was denied until she could be seen by a
5 doctor. (*Id.*)

6 Werthy had an MRI on November 21, 2002, that showed "advanced
7 disc degeneration" at L5-S1, with "a mild diffuse disc bulge in
8 conjunction with bilateral marginal spurring. This extends into
9 the region of the neuroforamina bilaterally but does not appear to
10 be associated with impingement upon the exiting L5 nerve roots."
11 (A.R. 559) The radiologist also noted "transitional vertebra at
12 the lumbosacral junction considered to be related to partial
13 lumbarization of S1." (*Id.*)

14 Werthy saw Jencina M. Butler, D.O., a family practitioner, on
15 January 7, 2003, to discuss the results of her MRI. She stated her
16 back pain was "severe" that morning. She had been unable to tie her
17 own shoes; she had "irritability" in her legs; and she had "pins
18 and needles" and numbness in her feet. (A.R. 535) She also had a
19 pins-and-needles sensation in her upper arms. (*Id.*) The doctor
20 advised Werthy "that her back pain is now chronic, and stems from
21 arthritis and radiculitis, which do[] not respond well to narcotics
22 (which the patient ha[d] NOT requested)." (A.R. 537) She gave
23 Werthy a prescription for Neurontin 300 mg at night, noting the
24 dosage could be increased if it was not working. She recommended
25 gentle exercise such as water aerobics, yoga, or tai chi. She
26 noted Werthy's pain might increase in the beginning, but likely
27 would decrease as her strength improved, and the exercise also
28 would help her depression. (*Id.*)

25 - FINDINGS AND RECOMMENDATIONS

1 Werthy saw Dr. Butler on January 21, 2003, for followup. She
2 reported "some improvement of her pain on Neurontin," and also
3 stated the medication had helped her "leg irritability." (A.R.
4 533) She reported pain improvement for about eight hours, but no
5 longer. She was "losing sleep as a result of her pain," and
6 requested a prescription for trazodone, which had worked for her in
7 the past. She was exercising gently every day, and stated her mood
8 had improved since she had begun exercising. The doctor increased
9 Werthy's Neurontin dosage to 300 mg three times daily. Werthy was
10 continued on Bextra as needed for "breakthrough pain," and she was
11 given a prescription for trazodone. (*Id.*)

12 Werthy saw Dr. Butler on June 11, 2003, for followup of her
13 ongoing back pain. She stated Neurontin was not providing her any
14 relief, and she was not sleeping well. She was exercising daily,
15 but had gained seven pounds from "eating more bacon." (A.R. 532)
16 She complained that her depression had been worse over the past two
17 or three months, partly due to her pain and sleep deprivation.
18 Werthy was counseled in "non-pharmacologic methods of pain control,
19 to which she was quite receptive." (*Id.*) The doctor prescribed
20 hydrocodone and trazodone, and directed Werthy to take Tylenol "for
21 controlling the arthritic component of her pain." (*Id.*) She was
22 scheduled to return for followup in one month to evaluate the
23 effectiveness of her medication regimen. (*Id.*)

24 Werthy saw Dr. Berselli on February 3, 2004, in connection
25 with her application for disability benefits. He ordered x-rays of
26 Werthy's cervical, lumbar, and thoracic spine. (See A.R. 585-90,
27 630-32) He saw Werthy again on February 10, 2004, to review the
28 x-ray findings, noting the following:

26 - FINDINGS AND RECOMMENDATIONS

1 The x-rays of the thoracic spine done on the
2 3rd of February seem unremarkable. The films
3 of the lumbar spine done on the same date show
4 severe degenerative disk disease at L4-5 and
5 L5-S1. Finally, the films of the cervical
6 spine done on the same date reveal degenera-
7 tive disk disease, severe in degree, at C3-4,
8 C4-5, and C5-6.

9 (A.R. 567; see A.R. 568-70)

10 On February 16, 2005, Werthy was admitted to the hospital with
11 pneumonia. She improved quickly on antibiotics and was discharged
12 on February 19, 2005. (A.R. 574-84)

13 On August 27 and 28, 2005, Werthy was seen for cellulitis of
14 the left leg and an abscess to her left lower extremity, possibly
15 resulting from a spider bite. She was directed to elevate her leg
16 above chest level for three days, rest, refrain from any strenuous
17 activity, and take Ibuprofen for pain. (A.R. 573, 591, 619-22)

18 The record reflects no doctor visits for two years thereafter.
19 On September 6, 2007, Werthy saw Song Jin Kim, M.D., an Internal
20 Medicine specialist, for a new-patient visit. (A.R. 623-24)
21 Werthy reported that her back and neck pain recently had gotten
22 worse, with pinching and numbness in her hands and legs, and a "lot
23 of pain across her neck and lower hip area just sitting around."
24 (A.R. 623) She also stated she felt depressed, and the pain was
25 causing her not to be as happy as she used to be. Dr. Kim
26 diagnosed Werthy with a depressive disorder with insomnia, for
27 which she prescribed trazodone 50 mg; and lumbago with associated
28 cervicalgia, for which she prescribed vicodin. (AR. 623-24)

29 Werthy returned to see Dr. Kim on September 20, 2007. She
30 still was having insomnia. She also had suffered a "crushing
31 injury" to her toe, which was treated with a "buddy wrap." On

1 examination, Werthy exhibited tenderness in the trapezius and
2 deltoid areas, and around her scapula on the right. The doctor
3 increased Werthy's trazodone dosage to 150 mg at night. (A.R. 625)

4 Werthy saw Dr. Kim on November 9, 2007, for followup. She
5 continued to complain of back pain. She was sleeping better, and
6 she had lost fifteen pounds. She was "tearful about the loss of
7 her mother," but she declined a prescription for another anti-
8 depressant. She was directed to continue on her current medications
9 and exercises. (A.R. 626)

10 On December 24, 2007, Dr. Kim wrote a letter to the state
11 agency regarding Werthy. Dr. Kim stated she had been treating
12 Werthy "for the past few months" for "Lumbago," "Cervicalgia," and
13 "Insomnia - possible." (A.R. 607) She stated Werthy's "physical
14 exam is essentially normal and I don't suspect any vascular or
15 neurologic disorder. However, she is in some musculoskeletal
16 discomfort and she has been attending to this very diligently with
17 some prescription medications and changes in her diet and exercise
18 programs." (*Id.*)

19 On January 22, 2008, Werthy saw Dr. Kim for followup, and to
20 request assistance with a questionnaire for the doctor's completion
21 in connection with Werthy's application for disability benefits.
22 (A.R. 609-15) Werthy reported that the trazodone was not helping.
23 She stated she had pain doing daily activities, "even just the
24 laundry," and she was "[u]nable to work because of spinal pain
25 . . . [radiating] into her arms and legs." (A.R. 627) The doctor
26 prescribed Fluoxetine 20 mg for depression, and hydrocodone with
27 acetaminophen for pain. (*Id.*)

1 On the questionnaire, Dr. Kim indicated she had been treating
2 Werthy "[a]bout once a month" for "lumbago/depression/cervicalgia."
3 (A.R. 609) She listed Werthy's symptoms as "feet dull, a lot of
4 pain, neck strain and pain and arm pain," and indicated Werthy's
5 prognosis was "good." (*Id.*) She noted tramadol had been ineffec-
6 tive in relieving Werthy's pain and also caused sedation. The
7 doctor opined Werthy likely would have "substantial difficulty with
8 stamina, pain or fatigue if [she] was working full time, eight
9 hours a day, at the light or sedentary levels of exertion," and she
10 would need to work at a reduced pace. (*Id.*) She further opined
11 Werthy's health problems would worsen if she worked full-time.
12 (A.R. 610) Dr. Kim indicated Werthy is not a malingerer, although
13 emotional factors do contribute to the severity of her symptoms and
14 functional limitations. (*Id.*)

15 Dr. Kim opined Werthy could tolerate a low-stress job, noting
16 Werthy "manages family stress ok but [gets] overwhelmed if too much
17 stress." (A.R. 611) She noted Werthy requires frequent changes in
18 position "to relieve pain and pressure in her spine." (*Id.*) She
19 estimated Werthy would be able to stand and walk for about two
20 hours, and sit for about four hours, in an eight-hour workday. She
21 could sit for twenty minutes before needing to change positions;
22 stand for ten minutes before changing positions; and she would need
23 to walk around every ten minutes for five minutes each time. She
24 would need the ability to change positions at will from sitting or
25 standing/walking, and she would need to lie down "every forty min."
26 during a work shift. The doctor indicated Werthy's x-rays
27 supported her opinions regarding Werthy's limitations. (A.R. 612)

1 Dr. Kim indicated Werthy should rarely twist, stoop/bend,
2 crouch, or climb stairs, and she should never climb ladders.
3 Werthy could feel and handle without limitation, but she would be
4 limited in her ability to reach, including overhead; finger; and
5 push/pull. She opined Werthy could lift up to ten pounds
6 occasionally, over ten pounds rarely, and she should never lift
7 over ten pounds. She based this opinion on Werthy's subjective
8 report that she "gets pain in her arms with weights of 5 pounds."
9 (A.R. 613) The doctor noted Werthy's symptoms worsen with
10 environmental changes, and Werthy should avoid concentrated
11 exposure to wetness, noise, and fumes/odors/dusts; and even
12 moderate exposure to extremes of hot and cold, and humidity. (A.R.
13 614) She indicated Werthy should avoid all exposure to hazards.
14 (*Id.*) In Dr. Kim's opinion, Werthy would be absent from work more
15 than four times a month due to her impairments or treatment. (*Id.*)
16 She further indicated Werthy had been continuously unable to work
17 since 1993. (A.R. 615)

18 Werthy saw Dr. Kim on February 5, 2008, for followup. Notes
19 indicate she was "[d]oing well with the vicodin and the prozac but
20 still has some difficulty sleeping." (A.R. 628) In addition,
21 Werthy had bronchitis. The doctor prescribed prednisone and an
22 inhaler for the bronchitis, and continued her on the hydrocodone
23 with acetaminophen. (*Id.*) These medications were refilled on
24 March 17, 2008. (A.R. 629)

25 On July 11, 2008, the ALJ wrote a letter to Dr. Kim requesting
26 clarification as to what appears to be two contradictory opinions.
27 The ALJ noted that in Dr. Kim's letter of December 24, 2007, she
28 expressed the opinion that Werthy "had had a normal physical

1 examination." (A.R. 633) However, when Dr. Kim completed the
2 questionnaire on January 22, 2008, she opined that Werthy "had
3 significant limits on her activities." (*Id.*) The ALJ asked the
4 doctor for assistance in understanding the bases of her opinions
5 and how she had arrived at her conclusions regarding Werthy's
6 functional limitations. (*Id.*) The ALJ requested a response within
7 ten days. No response from Dr. Kim appears in the administrative
8 record.

9 10 **B. Summary of the Vocational Evidence**

11 **1. VE's testimony**

12 At the ALJ hearing on July 14, 2008, the ALJ asked VE Paul
13 Morrison the following hypothetical question:

14 Assume an individual 49 years of age, has
15 completed the eleventh grade, and has a GED.
16 She has also completed EMT training. I want
17 you to assume that she can sit eight hours in
18 an eight hour day with normal breaks, and the
19 ability to shift positions or to stand. She
20 can stand and walk four to six hours in an
21 eight hour day, 30 minutes at a time, par-
22 ticularly if she can shift positions as from
23 one leg to another, or taking a step or two.
24 She can lift 10 pounds repeatedly. She must
25 avoid bending, crouching, kneeling, and
26 crawling. She also must avoid balancing,
27 unprotected heights, and hazardous machinery.
28 Can you identify any jobs she could perform?

22 (A.R. 676-77) The VE responded that the hypothetical individual
23 could work as an electronic assembler or a receptionist, both of
24 which are sedentary, semi-skilled jobs. She also could work as an
25 addresser, a surveillance system monitor, and a charge account
26 clerk, all of which are sedentary, unskilled jobs. (A.R. 677) All
27 of the jobs the VE listed would allow the individual to change
28 positions as noted in the ALJ's hypothetical. (A.R. 678)

1 Werthy's attorney asked the VE the following hypothetical
2 question:

3 Now let's assume that this person would need
4 to work at a reduced work pace if they are
5 employed full-time eight hours a day at the
6 light or sedentary levels of exertion and,
7 based on testimony received and yet to be
8 received, let's assume that is half or less of
9 a normal person. Let's assume this person
10 would frequently have health symptoms severe
11 enough to interfere with attention and concentra-
12 tion. This person would be limited to low
13 stress jobs. They would be able to stand and
14 walk about six hours with normal breaks during
15 an eight hour day, and they would be able to
16 sit about four hours with normal breaks during
17 an eight hour day. They would need, they
18 could sit up to 20 minutes at one time before
19 changing position, and stand up to 10 minutes
20 at one time before changing positions. They
21 would need to walk around about every 10
22 minutes, and on these occasions they would
23 need to walk around for about 5 minutes. They
24 would need to shift at will from sitting,
25 standing, and walking. This person would need
26 to lie down at unpredictable intervals during
27 a work shift, and this would happen about
28 every 40 minutes. They could rarely[,]
meaning 5 percent or less at a time[,]
twist, stoop, crouch or climb stairs, and never climb
ladders. They can occasionally lift and carry
less than 10 pounds and rarely, meaning 5
percent or less at a time, as much as 10
pounds. They should avoid moderate exposure
to extremes of heat and cold, avoid
concentrated exposure to wetness, as well as
noise, fumes, odors, dust and gases. Avoid
moderate exposure to humidity, and avoid all
exposures to hazards such as machinery and
heights. This person's health problems are
such that they could be expected to be absent
from work more than four times a month. If we
were to add those elements to the Judge's
hypothetical, is it likely that such a person
could sustain competitive employment in any of
the jobs you've discussed?

(A.R. 678-79) The VE responded that the hypothetical individual
would be unable to work.

Werthy's attorney asked the VE a second hypothetical question:

1 Let's add these to the Judge's original
2 hypothetical now, and assume this person has
3 headaches, and these will occur daily or
4 nearly every day, and two or three times a
5 day, and . . . would last for 15 or 20 minutes
6 during which they would not be functional.
7 The crying spells would occur two or three
8 times a day, however, which would tend to last
9 for hours rather than minutes when they would
10 not be functional. This person would have
11 some problems with dizziness, which would
12 occur daily, or nearly every day, and last for
13 about 15 or 20 minutes when they would not be
14 functional. We would have a problem with
15 panic attacks that would occur unpredictably.
16 These could occur up to as often as four times
17 a day when the person would not be functional,
18 and could last for minutes or hours. If we
19 added those elements to the Judge's
20 hypothetical, is it likely that such a person
21 could sustain competitive employment in any of
22 the jobs you've discussed?

23 (A.R. 679-80) The VE responded that the individual would be unable
24 to maintain employment. (A.R. 680)

25
26 **2. Third-party evidence**

27 Werthy apparently attempted to find employment through the
28 State of Oregon's Office of Vocational Rehabilitation. On June 5,
29 2008, her voc-Rehab Counselor wrote her a letter stating, "As we
30 discussed in your last appointment we came to the conclusion that
31 your pain is interferring [sic] with you being able to find
32 employment at this time. Because of this we are closing your file
33 like we had discussed. Please feel free to reapply whenever you
34 feel like you are able to participate in the vocational
35 activities." (A.R. 344)

36 / / /

37 / / /

38 / / /

1 **C. Medical Expert's Testimony**

2 David Ruleman, M.D. testified as a medical expert at the ALJ
3 hearing. He is board certified in internal medicine. He has never
4 examined Werthy, but he has reviewed all the medical evidence of
5 record. He found Werthy to have medically-determinable impairments
6 consisting of neck and low back pain, degeneration of the L5-S1
7 disc space, and "similar abnormalities" in her cervical spine.
8 (A.R. 639)

9 Dr. Ruleman noted that Dr. Webster examined Werthy twice and
10 found no objective findings to support any physical limitations on
11 Werthy's abilities. (A.R. 640-41) With regard to Dr. Kim's
12 opinion that Werthy has significant limitations, Dr. Ruleman noted
13 the record did not contain treatment notes from Dr. Kim to support
14 her opinion.⁹ In addition, he indicated her opinion was in
15 conflict with Dr. Webster's 2004 and 2005 examinations of Werthy.
16 (A.R. 640-41)

17 From his examination of the records, Dr. Ruleman opined Werthy
18 would have "some limitations but . . . not sufficient to interfere
19 with many types of work activity." (A.R. 642) He opined Werthy
20 would be able to sit for four hours at a time, for a total of eight
21 hours during the workday, "particularly if she has the ability to
22 rise when needed." (*Id.*) He opined she could stand for thirty
23 minutes at one time, assuming she could shift her weight from one
24 leg to the other, take a step forward, or similarly shift position.
25 (*Id.*) If she could alternate sitting and standing, he indicated
26

27 ⁹As referenced above in the discussion of Werthy's medical
28 records, Dr. Kim's treatment notes do appear in the administrative
record.

1 Werthy should be able to stand a total of four hours during the
2 work day. (*Id.*) He further opined Werthy could "[d]efinitely"
3 lift ten pounds repeatedly. She could do reaching, but likely
4 could not perform other postural activities. (A.R. 643) He stated
5 Werthy would have to change positions more than once every two
6 hours. (*Id.*)

7
8 ***D. Werthy's Testimony***

9 ***1. July 14, 2008, Hearing***

10 Werthy testified to the following facts at the ALJ hearing.
11 She was born in 1959, and was forty-nine years old at the time of
12 the hearing. She lives with David Shea, who has been helping her
13 since her mother died, but he expects to be repaid. She gets food
14 stamps on her own behalf, and she also gets food stamps and medical
15 benefits for her two young cousins, who live with her. Werthy has
16 a G.E.D., and after high school, she completed an EMT course and
17 worked for nearly a year at an ambulance service. (A.R. 665-68)
18 She can read a newspaper and write a letter. To her recollection,
19 she last worked in 1992 or 1993. (A.R. 668)

20 She first started having problems with headaches within a
21 couple of years after her accident. Her headaches are getting
22 worse as time goes by. She has "pain in [her] head" at least four
23 days out of every week. When she gets a headache, she takes
24 medication, and it is about fifteen to twenty minutes before she
25 gets relief. The headaches interfere with her ability to function.
26 (A.R. 645-46)

27 She also has arthritis, which began immediately after the
28 accident in 1993. Due to the arthritis, she cannot get around as

1 quickly as she used to. She stated the arthritis is "spreading,"
2 because it originally was only in one leg, but now her other leg is
3 beginning to hurt more. (A.R. 646) She also stated her ankles
4 swell up and hurt a couple of times a week. (A.R. 659)

5 She has a lot of pain in her neck, and she has difficulty
6 raising her head to look up. When she turns her head from side to
7 side, she hears a cracking noise. Her legs hurt all the time due
8 to pain radiating from her back. She also has pain in her feet,
9 and in her arms and hands. She has pain all day, every day,
10 despite taking medication. She has to have help carrying
11 groceries, braiding her hair, washing dishes, and other tasks. She
12 sometimes drops dishes. She does very little housework. (A.R.
13 647-48, 660, 662)

14 Werthy stated she has problems with diarrhea that started in
15 about 2005. She has accidents when she cannot get to a bathroom in
16 time. She stated she has virtually no advance notice when she is
17 going to have diarrhea, and she frequently has to change her
18 clothes after an attack. She stated she goes to the bathroom
19 regularly "from seven to ten times a day," and she has to shower
20 and change her clothes "three times a day." (A.R. 649) She
21 estimated she would be away from work "maybe 75 percent of the
22 time" because she would be in the bathroom. (*Id.*) Upon
23 questioning by the ALJ, Werthy later stated she has not mentioned
24 her diarrhea to any doctor because she has been able to control it
25 by eating cheese. Now she has diarrhea "every once in awhile . . .
26 [o]ff and on." (A.R. 669-70) She also explained that she never
27 mentioned the diarrhea problem to her doctor because she wasn't
28 experiencing diarrhea on the day she saw the doctor. (A.R. 670-72)

1 She also suffers from depression, which began soon after the
2 1993 accident. She no longer likes to leave the house except for
3 doctors' appointments and the like. She stated she has gained a
4 lot of weight due to the depression. She also has problems
5 sleeping, getting only a couple of hours of sleep at night. She
6 gets up four to six times during the night. She is tired when she
7 gets up in the morning, She naps frequently during the day for
8 short periods of time, and she also takes a longer nap of at least
9 an hour once a day. (A.R. 650-51, 658-59) She also stated
10 depression has affected her energy level, stating, "There is no
11 energy level. I mean, I have to practically be dragged out of the
12 house now in order to go anywhere, or to even feel like I'm alive
13 again." (A.R. 651) Werthy stated she used to be very active and
14 have a lot of interests prior to the accident, but this has changed
15 substantially and "[i]t's been really a different life for [her]."
16 (*Id.*) She feels guilty because she is unable to do her best due to
17 her constant pain. She also has problems concentrating. She can
18 only read for a few minutes at a time before she loses focus or
19 interest. (A.R. 652, 656)

20 Werthy also described fits of anger, and frequent panic
21 attacks, often several times a day. She stated the panic attacks
22 have been getting worse since her mother's death. When she has a
23 panic attack, it might take her three or four hours to calm down
24 and stop crying "and just feeling worthless." (A.R. 653-54) She
25 has crying spells two or three times a day, each lasting "a couple
26 of hours." (A.R. 655) During a crying spell, she is "[n]ot very
27 functional at all because [she is] so busy and [she will] be
28 thinking about the pain." (*Id.*)

1 Her fits of anger occur frequently, every day. She stated she
2 has "hollered at [her] friends," and they have asked what was wrong
3 with her because she is not acting like herself. (A.R. 656)

4 A couple of times a week, she also experiences dizziness that
5 lasts for fifteen to twenty minutes. When she has a dizzy spell,
6 she generally takes medication and goes to sleep. (A.R. 655) She
7 stated her pain has gone into her extremities during the last few
8 years and she is "just not the same person as [she] used to be."
9 (A.R. 657) She is "in pain daily all the time, chronic pain all
10 the time and it is getting worse[.]" (*Id.*) Werthy does not
11 believe she will ever be well enough to return to work. (A.R. 658)

12 Werthy estimated she could stand for no more than fifteen
13 minutes before she would need to take a break. She could walk up
14 to two blocks before stopping to rest. She estimated she could be
15 on her feet standing or walking for a total of two hours per day,
16 if she were allowed to take breaks as needed. She stated she could
17 sit in a chair for no more than five to ten minutes before needing
18 a break, and she could sit for a total of "a few hours" if she
19 could take all of the breaks she needed. She indicated that
20 sitting in the chair in the hearing room was causing her pain.
21 (A.R. 660-61) She has problems bending at the waist and kneeling,
22 both of which hurt her back. She would have difficulty crawling
23 due to pain in her knees, back, and neck. (A.R. 661-62) She
24 stated the pace at which she does things has slowed considerably
25 since her accident. She estimated she functions at about 10% of
26 her pre-accident level. (A.R. 662)

27 / / /

28 / / /

1 **2. Personal Pain Questionnaire dated 2/24/04**

2 Werthy completed a "Claimant Pain Questionnaire" in connection
3 with her application. (A.R. 165-67) She stated she had aching,
4 stinging pain in her neck and lower back, radiating into her legs,
5 arms, hands, and feet. She stated she is in pain "all day and
6 night, even when I sleep." (A.R. 165) Sitting or standing for too
7 long a time makes the pain worse. She indicated nothing helps the
8 pain. She takes Ibuprofen three times a day, "as needed," and she
9 also does some exercise. (A.R. 166) She stated she can only be up
10 and active for "15 min., or less" before she has to stop and rest.
11 (*Id.*) She can start washing dishes or doing laundry, but she
12 cannot finish these tasks. She used to be able to run, jump, ride
13 horses, wash dishes, do laundry, wash walls, and mop floors, but
14 she is no longer able to do any of these activities. (*Id.*) She
15 estimated she can walk one block before she needs to rest. She
16 sometimes needs assistance tying her shoes or zipping a zipper
17 because of pain in her hands. She requires assistance with
18 household chores including mopping floors, washing dishes, washing
19 clothes, and making beds. She uses public transportation when she
20 goes out, but it makes her pain worse so she rarely leaves the
21 house. She can prepare her own meals using a microwave, but
22 friends also cook for her. She is unable to engage in any hobbies
23 or pastimes. (A.R. 167)

24
25 **3. Activities of Daily Living questionnaire dated 2/24/04**

26 Werthy also completed a form regarding her activities of daily
27 living and socialization. (A.R. 168-74) She stated she walks to
28 the bathroom and bedroom, and watches television. Her mother does

1 all of the housework. She stated her eating habits have changed
2 since her accident, causing her to gain weight. She plays cards
3 sometimes, but has no other activities. She indicated she used to
4 bake cakes, but she no longer does this.

5
6 **4. Function Report dated 5/27/05**

7 Werthy completed a Function Report providing information about
8 her daily activities and limitations. She described her daily
9 activities as follows:

10 I get up [and] read my bible, take a shower.
11 Take my medic[i]ne for the morning, then I
12 help my mother with her meds, she have [sic]
13 cancer, I cook me something to eat. I started
my dinner for the evening when it is done, I
make the food. Eat and take a shower and take
my meds and go to bed.

14 (A.R. 225)

15 Werthy stated she does not sleep well because she is in pain
16 all of the time. It causes her pain to dress herself, to bathe,
17 and to comb her hair. (A.R. 226) She prepares her own meals,
18 giving examples of "corn, chicken, rice, spaghetti, hamburgers,
19 fish, [and] sandwiches." (A.R. 227) She stated she makes "2 meals
20 daily, 7 meals weekly, 28 meals monthly,"¹⁰ and it takes her three
21 hours to prepare a whole meal. (*Id.*) She stated her arms and
22 shoulders hurt when she cooks. (*Id.*) She sometimes requires
23 assistance tying her shoes and getting onto a bus, and a friend
24 helps her as needed. (A.R. 229)

25 Werthy indicated she does laundry, washes dishes, and combs
26 her hair. She stated combing her hair takes her about fifteen
27

28 ¹⁰Needless to say, these numbers are not consistent.

1 minutes. Someone else braids her hair for her when she wears her
2 hair in braids. She does laundry every two weeks. (A.R. 227) She
3 does not do some housework or yard work because of pain in her
4 back, neck, shoulders, and knees. She stated she is in pain even
5 when she is asleep, and pain sometimes wakes her up at night. She
6 leaves the house for an appointment a few times a month, and she
7 starts getting ready an hour beforehand. (A.R. 228) When she goes
8 out, she walks and uses public transportation. (*Id.*)

9 Werthy stated she shops for food about once a month, usually
10 buying vegetables, milk, bread, canned goods, and eggs. She is
11 able to pay her own bills, and handle a bank account. (*Id.*)
12 Otherwise, she does not go out because if she has to sit or stand
13 for too long, her pain will increase. (A.R. 229)

14 She likes to play cards, but stated her hands start hurting,
15 so she will take a break and walk around the block. She plays
16 cards once a week, and walks around the block three times a week.
17 She used to enjoy running, riding a bicycle, driving, cooking out,
18 jumping, and riding horses, but she is not able to do those
19 activities anymore due to pain. She regularly spends time on the
20 telephone with her boyfriend, niece, and sister. She stated she
21 does not engage in activities because she is "in pain all over."
22 (*Id.*; A.R. 230))

23 Werthy stated she is in pain with any physical activities such
24 as lifting, squatting, bending, handling, and the like. She
25 estimated she can walk to the bus, or around the block, which takes
26 five to ten minutes, before she has to rest. She estimated she can
27 pay attention for fifteen to twenty minutes at a time, and she
28 tries to follow written and oral instructions. (A.R. 230) She

1 gets along well with authority figures, and she handles changes in
2 routine well. She will "get touchy with some of [her] family"
3 occasionally when she is under stress. She wears glasses to read.
4 (A.R. 231) Werthy remarked, "I have been in pain for so long, I
5 still have not been helped so I can move on in my life. I hope I
6 can get some help." (A.R. 232)

7 8 ***E. Third-Party Testimony***

9 Werthy had two witnesses ready to testify on her behalf at the
10 July 14, 2008, ALJ hearing. When Werthy's attorney stated, "I have
11 two more witnesses," the ALJ responded, "Well, you are most welcome
12 to submit statements from them. However, we have another hearing
13 starting at 2:30, and it is now 2:28. All right. This hearing is
14 closed." (A.R. 681)

15 David Shea wrote a letter stating he has known Werthy for
16 nearly seventeen years. During that time, according to Shea,
17 Werthy lived with her mother, staying with Shea on weekends or when
18 she and her mother would have a falling-out. Shea stated that when
19 Werthy's mother died about three years earlier, the family home was
20 lost and the "two great grand nieces whom she had guardianship [sic]
21 over were under the threat of being taken into foster care and
22 broken up." (A.R. 345) Shea had Werthy and the children move in
23 with him, and he helped her get guardianship of the two girls. He
24 stated, "I have been trying to help her get help getting back to
25 work and then she could pay me back for my incurred cost. Her
26 pain, depression, anger and lack of mental focus has made this
27 impossible." (*Id.*) According to Shea, Werthy is able to walk two
28 to four blocks at a time before she has to rest for at least

1 fifteen minutes. He stated she is clumsy, and he has "seen her
2 fall for no reason two time[s] in one month and at least once every
3 two months regularly." (A.R. 345-46) He stated Werthy is unable
4 to lift dishes up to the top shelf without dropping them. He has
5 observed that she takes a lot of pain medication and according to
6 him, Werthy "is in pain up to 60% of the time." (A.R. 346) He
7 further stated:

8 She is fatigued . . . up to 30-60% on bad
9 weeks and 15-20% on the good weeks, and this
10 is during the productive times of the day.
11 When she is able to function it is at 50%
12 capacity. This is accompanied [sic] by crying
13 spells lasting maybe 20 min. at a time 3 times
14 a week, or on better weeks 1-2 times a week,
15 but it is the anger spells that last more
16 often - 2 times a day, 15-20 min. at a time
17 spent with repression for hours in between. I
18 don't see how she can get back to work and
19 keep gainfull [sic] employment.

20 (Id.)

21 Quentin Sandvig wrote a letter stating he has known Werthy for
22 about fifteen years. He began noticing her health starting to
23 decline "8 or 9 years ago," with "very visible change in her motion
24 and mental state" over the last five years. (A.R. 347) He stated
25 Werthy seems to be in pain continually, and she fatigues easily.
26 She drops things easily and she "becomes frustrated, moody and
27 blows up in anger." (Id.) He stated she sometimes breaks down and
28 cries for hours, or flies into an angry rage. He estimated Werthy
is angry 60% to 75% of the time. (A.R. 348) According to Sandvig,
Werthy cries "on a regular basis, 2-5 times a week." (Id.) She
calls him regularly and "always seems upset and crying all the
time." (Id.) He also has noticed that it takes Werthy longer to

1 move and walk, and she appears to be "disoriented and tired all the
2 time." (*Id.*)

3 David Shea completed a third-party statement concerning
4 Werthy's activities of daily living, dated November 28, 2001.
5 (A.R. 153-67) He noted Werthy seemed to be upset frequently from
6 pain, and she became angry much more than previously ("to[]o much
7 in my opinion."). (A.R. 155) He indicated Werthy spent her days
8 watching television and sometimes listening to the radio. She
9 played cards twice a month for one-half hour each time, but she had
10 no other hobbies. According to Shea, Werthy napped several times
11 a week, for varying lengths of time. He stated she could prepare
12 hot dogs, but not much else. She attempted to do housework, but
13 would "go[] down in her back," so Shea did most of the housework.
14 (A.R. 160-61) Shea opined Werthy might be able to learn to type
15 with help, but she would need a back support to sit for any length
16 of time. (A.R. 163)

17 Shea completed a similar form on November 6, 2002. (A.R. 122-
18 33) He stated Werthy was argumentative when she was depressed.
19 She could prepare hot dogs, and would do dishes every few days.
20 She had no hobbies or activities, and spent no time with friends
21 except Shea. Shea observed that when Werthy's medication wears
22 off, her pain increases. He described her usual daily activities
23 as watching television, taking her medications, calling doctors,
24 and fixing hot dogs. (A.R. 122-33)

25 On June 22, 2005, Werthy's mother, Darlean Mathews, completed
26 a Function Report - Adult - Third Party. (A.R. 194-201) Mathews
27 stated Werthy spent her days watching television, fixing food to
28 eat, taking a shower, and taking medicine. She helped her mother

1 with home care when she was able. Werthy could perform her own
2 personal care tasks, but she sometimes would need help tying her
3 shoelaces. Mathews stated Werthy would cook a couple of times a
4 day, and she tended to burn herself more than she used to.
5 According to Mathews, Werthy was unable to do many household chores
6 because of pain in her hand. She estimated Werthy might spend
7 about forty-five minutes a day doing housework, "if her hand and
8 legs stop hurting." (A.R. 196) She stated Werthy is in pain all
9 the time, and sometimes Werthy cries herself to sleep. She
10 estimated Werthy could walk about two blocks before she would have
11 to stop and rest for fifteen to twenty minutes. (A.R. 194-201)

12 Mathews completed a similar report on February 24, 2004.
13 (A.R. 175-83) She indicated she sometimes had to help Werthy tie
14 her shoes. She described Werthy's daily activities similar to her
15 2005 description; i.e., watching television, taking her medica-
16 tions, attempting to do light housework, taking a shower. Mathews
17 indicated Werthy did not sleep well at night. She stated Werthy
18 took care of most of her personal care, but it caused her pain to
19 bathe, dress, and use the toilet. She stated Werthy could not care
20 for her hair without assistance. At that time, in 2004, she stated
21 Werthy did no food preparation at all. She used to cook daily, but
22 according to Mathews, cooking now caused her too much pain.
23 Mathews listed a number of activities Werthy used to enjoy that she
24 no longer was able to do, and she stated basically Werthy is in
25 pain all of the time. (*Id.*)

26 / / /

27 / / /

28 / / /

1 **III. DISABILITY DETERMINATION AND BURDEN OF PROOF**

2 **A. Legal Standards**

3 A claimant is disabled if he or she is unable to "engage in
4 any substantial gainful activity by reason of any medically
5 determinable physical or mental impairment which . . . has lasted
6 or can be expected to last for a continuous period of not less than
7 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

8 "Social Security Regulations set out a five-step sequential
9 process for determining whether an applicant is disabled within the
10 meaning of the Social Security Act." *Keyser v. Commissioner*, ____
11 F.3d ___, 2011 WL 2138237, at *3 (9th Cir. June 1, 2011) (citing 20
12 C.F.R. § 404.1520). The Keyser court described the five steps in
13 the process as follows:

14 (1) Is the claimant presently working in a
15 substantially gainful activity? (2) Is the
16 claimant's impairment severe? (3) Does the
17 impairment meet or equal one of a list of
18 specific impairments described in the regula-
19 tions? (4) Is the claimant able to perform
20 any work that he or she has done in the past?
21 and (5) Are there significant numbers of jobs
22 in the national economy that the claimant can
23 perform?

24 *Id.* (citing *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir.
25 1999)); see *Bustamante v. Massanari*, 262 F.3d 949, 953-54 (9th Cir.
26 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f) and 416.920 (b)-(f)).
27 The claimant bears the burden of proof for the first four steps in
28 the process. If the claimant fails to meet the burden at any of
those four steps, then the claimant is not disabled. *Bustamante*,
262 F.3d at 953-54; see *Bowen v. Yuckert*, 482 U.S. 137, 140-41, 107
S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987); 20 C.F.R.
§§ 404.1520(g) and 416.920(g) (setting forth general standards for

1 evaluating disability); 404.1566 and 416.966 (describing "work
2 which exists in the national economy"); 416.960(c) (discussing how
3 a claimant's vocational background figures into the disability
4 determination).

5 The Commissioner bears the burden of proof at step five of the
6 process, where the Commissioner must show the claimant can perform
7 other work that exists in significant numbers in the national
8 economy, "taking into consideration the claimant's residual
9 functional capacity, age, education, and work experience." *Tackett*
10 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner
11 fails meet this burden, then the claimant is disabled, but if the
12 Commissioner proves the claimant is able to perform other work
13 which exists in the national economy, then the claimant is not
14 disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R.
15 §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1098-99).

16 The ALJ determines the credibility of the medical testimony
17 and also resolves any conflicts in the evidence. *Batson v. Comm'r*,
18 359 F.3d 1190, 1196 (9th Cir. 2004) (citing *Matney v. Sullivan*, 981
19 F.2d 1016, 1019 (9th Cir. 1992)). Ordinarily, the ALJ must give
20 greater weight to the opinions of treating physicians, but the ALJ
21 may disregard treating physicians' opinions that are "conclusory,
22 brief, and unsupported by the record as a whole, . . . or by
23 objective medical findings." *Id.* (citing *Matney, supra*; *Tonapetyan*
24 *v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)). If the ALJ
25 disregards a treating physician's opinions, "the ALJ must give
26 specific, legitimate reasons'" for doing so. *Id.* (quoting *Matney*).

27 The ALJ also determines the credibility of the claimant's
28 testimony regarding his or her symptoms:

47 - FINDINGS AND RECOMMENDATIONS

In deciding whether to admit a claimant's subjective symptom testimony, the ALJ must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step prescribed by *Smolen*, . . . the claimant must produce objective medical evidence of underlying "impairment," and must show that the impairment, or a combination of impairments, "could reasonably be expected to produce pain or other symptoms." *Id.* at 1281-82. If this . . . test is satisfied, and if the ALJ's credibility analysis of the claimant's testimony shows no malingering, then the ALJ may reject the claimant's testimony about severity of symptoms [only] with "specific findings stating clear and convincing reasons for doing so." *Id.* at 1284.

Batson, 359 F.3d at 1196.

B. The ALJ's Decision

The ALJ first discussed the appropriate date for consideration of Werthy's claimed disability. Although Werthy claims she became disabled in 1993, the ALJ observed that the earliest medical evidence of record is from July 1999. Thus, the ALJ held, disability, or even the severity of Werthy's impairments, cannot be determined prior to that date. (A.R. 20)

In addition, the ALJ noted Werthy had filed an application for SSI only. Because SSI regulations do not provide for retroactive payments, the ALJ limited discussion of Werthy's medical problems to the period beginning on the date she filed her application; i.e., April 22, 2005. (*Id.*)

The ALJ found Werthy has not engaged in substantial gainful activity since April 22, 2005. She found Werthy's neck and back pain to be a "severe combination of impairments." (A.R. 20) She further found Werthy's "diarrhea; sleep disturbance; borderline intellectual functioning/organic brain syndrome; history of

1 substance abuse in long term sustained remission; depression;
2 headaches; loss of concentration; panic attacks; dizziness; and
3 anger; and obesity," to be non-severe impairments. (*Id.*) She
4 found that none of Werthy's impairments, either singly or in
5 combination, meet the Listing level of severity. (A.R. 22)

6 The ALJ found Werthy to have the following residual functional
7 capacity:

8 [T]he claimant has the residual functional
9 capacity to perform light work as defined in
10 20 CFR 416.967(b). This capacity is modified.
11 The claimant is able to sit 8 hours out of 8
12 hours with normal breaks as long as she can
13 alternate between sitting and standing when
14 necessary. The claimant can stand a total of
15 4 to 6 hours per 8 hour day for 30 minutes at
16 one time if she can shift positions, from one
17 leg to the other or take a step or two. The
18 claimant is able to lift 10 pounds repeatedly,
19 but must avoid bending, crouching, kneeling,
20 crawling, balancing, as well as exposure to
21 unprotected heights, and hazardous machinery.

22 (A.R. 23)

23 The ALJ found Werthy's back and neck pain reasonably could be
24 expected to produce the symptoms she alleges, but she further found
25 Werthy's subjective complaints regarding her symptoms not to be
26 fully credible. She found that the medical records undermined
27 Werthy's testimony, which she found to be "internally incon-
28 sistent." (A.R. 24) In support of this finding, the ALJ noted the
29 following:

- 30 • Although Werthy testified she had not worked since 1993, she
31 told Dr. Kim on September 6, 2007, that she "used to work with
32 her mother as care taker when mother was alive; mother died in
33 2005 and then that source of income went away[.]" (A.R. 24,
34 623) On November 9, 2007, Dr. Kim noted she was "tearful

1 about the loss of her mother and how her family has taken
2 advantage of her, especially in regards to stealing her
3 inheritance - a house that she and her mother worked at to
4 make into a business." (A.R. 24, 626) The ALJ found these
5 statements indicated Werthy had been "less than truthful about
6 her work activity and her capacity to function." (A.R. 24)

- 7 • Werthy testified she would be away from work 75% of the time
8 because she would be in the bathroom with diarrhea, which
9 caused her to need to shower and change clothes frequently.
10 Yet Werthy failed to even mention diarrhea to her treating
11 physicians other than a single notation in 2001. The ALJ
12 further noted that in 2003, Werthy's treating physician at the
13 time listed "chronic lumbar pain," insomnia, and depression as
14 Werthy's complaints, with "no reference to the headaches
15 [Werthy] has supposedly had since 1995, to any upper body or
16 neck problem, to pain in her legs, or to incontinence." (*Id.*)
- 17 • Werthy testified her physical problems are getting worse, yet
18 Dr. Kim indicated Werthy does not have a condition that would
19 tend to degenerate or deteriorate over time. (A.R. 25, citing
20 A.R. 609, ¶ 8). In addition, the ALJ found the medical
21 records failed to show any significant increase in Werthy's
22 symptoms over time. (A.R. 25)
- 23 • The ALJ found Werthy's "litany of complaints and described
24 daily inability to function [to be] radically different than
25 how she described her activities and symptoms when she
26 completed a function report dated May 25, 2005 [A.R. 225-32]."
27 The ALJ noted at that time, Werthy was caring for her mother
28 who had cancer, and her two young cousins, and doing all of

1 the household chores and grocery shopping. The ALJ noted,
2 "Although the claimant described pain in her back, legs, and
3 arms, it did not prevent her from independently performing
4 these activities." (*Id.*)

5 • The consulting psychiatrist who examined Werthy on July 12,
6 2005, noted she was "independent with respect to meals,
7 finances, shopping, transportation, and housework." (*Id.*,
8 citing A.R. 597-601¹¹) In addition, Werthy told the doctor
9 that her typical day included walking to the park with her
10 boyfriend - an activity the ALJ found in conflict with
11 Werthy's testimony of "only being able to walk 2 blocks."
12 (*Id.*)

13 • The ALJ noted "the source of Werthy's back pain is
14 congenital," yet this impairment "did not prevent her from
15 doing the strenuous work of an EMT or the physically demanding
16 work of a home health care aide." (*Id.*) She found no
17 evidence in the record to support Werthy's claim that her
18 symptoms worsened after her mother's death in 2005, noting
19 Werthy was only taking over-the-counter anti-inflammatory
20 medications at that time. (*Id.*)

21 The ALJ gave little weight to "the recently submitted July
22 2008 statements, allegedly by Quentin Sandvig and David Shea." She
23 found the handwriting on the two statements to be "remarkably
24 similar as if the same person wrote these brief statements." (*Id.*)
25 She further found that both witnesses had "describe[d] a
26

27 ¹¹The ALJ erroneously listed "Ex. 27F" in support of this
28 statement. Dr. Cloak's report actually is Exhibit 26F, pages 597-
601 of the Administrative Record.

1 deterioration in the claimant's health which is not reflected any
2 where else in the hearing record." (*Id.*)

3 The ALJ also did not give full weight to all of Dr. Kim's
4 opinions regarding Werthy's functional limitations. She noted
5 Dr. Kim had not performed a nerve conduction study to verify any
6 problems with Werthy's arms and hands, and her opinion overall was
7 inconsistent with her own records and the balance of the medical
8 evidence. The ALJ gave "some weight" to her opinion that Werthy
9 suffers from "some musculoskeletal discomfort," but no weight to
10 the balance of her opinions. (A.R. 26)

11 The ALJ gave no weight to the letter from Werthy's vocational
12 rehabilitation counselor, indicating Werthy's file was being closed
13 because her "pain was interfering with her being able to find
14 employment." (*Id.*, citing A.R. 344) She noted the action was
15 taken "apparently based solely on [Werthy's] complaints." (*Id.*)

16 Regarding Werthy's complaint that she suffers from depression,
17 which affects her ability to concentrate and to work full time, the
18 ALJ noted Werthy had never sought mental health treatment. She
19 noted Werthy had "taken Trazodone to improve her sleep but it was
20 not until January 2008 that she was prescribed an anti-depressant,
21 Prozac[.]" (*Id.*) Two examining mental health professionals had
22 found Werthy not to suffer from symptoms that would prevent her
23 from working. The one non-examining psychologist, Bill Hennings,
24 who opined Werthy would be "moderately limited in her ability to
25 understand, to persist, to socially interact, and to adapt to
26 changes[,] " failed to provide any basis for his opinion. (*Id.*,
27 citing A.R. 450-53) The ALJ therefore gave Dr. Hennings's opinion
28 "no evidentiary weight." (*Id.*)

1 The ALJ concluded Werthy could not return to her past relevant
 2 work as a home care giver, which requires a medium exertional
 3 capacity. Relying on the VE's testimony, the ALJ found Werthy is
 4 "capable of making a successful adjustment to other work that
 5 exists in significant numbers in the national economy," giving
 6 examples of electronic assembler, receptionist, addresser,
 7 surveillance systems monitor, and charge account clerk. (A.R. 27)
 8 The ALJ therefore found Werthy not to be disabled. (A.R. 27-28)

10 **IV. STANDARD OF REVIEW**

11 The court may set aside a denial of benefits only if the
 12 Commissioner's findings are "'not supported by substantial evidence
 13 or [are] based on legal error.'" *Bray v. Comm'r*, 554 F.3d 1219,
 14 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d
 15 880, 882 (9th Cir. 2006)); accord *Black v. Comm'r*, slip op., 2011
 16 WL 1930418, at *1 (9th Cir. May 20, 2011). Substantial evidence is
 17 "'more than a mere scintilla but less than a preponderance; it is
 18 such relevant evidence as a reasonable mind might accept as
 19 adequate to support a conclusion.'" *Id.* (quoting *Andrews v.*
 20 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

21 The court "cannot affirm the Commissioner's decision 'simply
 22 by isolating a specific quantum of supporting evidence.'" *Holohan*
 23 *v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*
 24 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court
 25 must consider the entire record, weighing both the evidence that
 26 supports the Commissioner's conclusions, and the evidence that
 27 detracts from those conclusions. *Id.* However, if the evidence as
 28 a whole can support more than one rational interpretation, the

ALJ's decision must be upheld; the court may not substitute its judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

V. DISCUSSION

A. Severity of Werthy's Impairments

Werthy first argues the ALJ erred in finding that her depression, borderline intellectual functioning, insomnia, diarrhea, headaches, and "feet, arm & hand limitations" were not "severe" impairments as defined by the regulations. Dkt. #15, pp. 21-26. An impairment is considered "severe" if it "significantly limits [a claimant's] physical or mental ability to do basic work activities[.]" 20 C.F.R. §§ 416.920(c). "Basic work activities" are "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 416.921(b). The regulations give examples of basic work activities including "Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "Capacities for seeing, hearing, and speaking"; "Understanding, carrying out, and remembering simple instructions"; "Use of judgment"; "Responding appropriately to supervision, co-workers and usual work situations"; and "Dealing with changes in a routine work setting." *Id.* Werthy claims the ALJ's rejection of her impairments as "non-severe" is not supported by substantial evidence in the record.

1. Depression & Borderline Intellectual Functioning

Werthy argues the ALJ erred in adopting the conclusion of examining psychiatrist Dr. Cloak that "[t]here do not appear to be

1 any psychiatric limitations to effective job performance, although
2 certain tasks may be limited by her chronic pain." (A.R. 601)
3 Werthy argues that "multiple other physicians" treated her for
4 depression, and two consultative examiners, Dr. Powell and Dr.
5 Brown, both diagnosed her with depression and borderline
6 intellectual functioning ("BIF"). She argues the ALJ failed to
7 address those opinions, and the treatment notes regarding her
8 depression. Dkt. #15, pp. 22-23. Werthy further notes Dr. Powell
9 concluded from his testing that she has well below average IQ
10 scores, and deficits in concentration and arithmetic. *Id.*, p. 23.
11 She argues the record evidence of her ongoing treatment for
12 depression, coupled with the consultative examiners' and
13 nonexamining consultants' findings that she has depression and BIF,
14 as well as moderate limitations, "negate the ALJ's conclusion that
15 Dr. Kim's opinions are contradicted by other physicians[.]" *Id.*

16 The Commissioner notes Dr. Powell recommended Werthy pursue
17 work activity. However, Dr. Powell also observed, "It is likely
18 that symptoms of depression may interfere [with Werthy's ability to
19 work] in the sense that she may struggle to have an adequate level
20 of drive in pursuing activities that would help her be more inde-
21 pendent." (A.R. 494) He further noted it could take Werthy six to
22 twelve months before she could maintain employment due to "the
23 length of time that she has been away from employment and the
24 combination of physical and medical symptoms and symptoms of
25 depression present[.]" *Id.*

26 Non-examining consultants found moderate limitations based on
27 Werthy's depression and borderline intellectual functioning on
28 December 3, 2001 (A.R. 355-58); September 16, 2002 (A.R. 380-93);

1 and December 6, 2005 (A.R. 449). Examining consultants similarly
2 diagnosed Werthy with depression and BIF on August 18, 2001 (A.R.
3 492); November 12, 2002 (A.R. 528); and April 7, 2004 (A.R. 600).

4 On December 2, 1999, Werthy's then-treating physician noted
5 that her depression and anxiety were well-controlled on medication,
6 and had a definite correlation with her chronic pain. (A.R. 473,
7 474) On April 6, 2000, notes continue to indicate her depression
8 was well-controlled. (A.R. 464-65) On April 2, 2001, Werthy saw
9 a doctor to get established as a new patient. She completed a
10 "Review of Systems" form on which she indicated she had stress and
11 depression stemming from her ongoing back pain and menstrual
12 bleeding problems, but she had no other health problems or
13 concerns. (A.R. 512) Werthy returned for an annual physical
14 examination on May 7, 2001, and her depression was noted to be
15 "stable" on her current medications. (A.R. 509)

16 When Werthy saw Dr. Powell in August 2001, she stated she had
17 suffered from depression "real bad" for two years, describing
18 symptoms of excessive sleeping, increased irritability, and "a bad
19 attitude." (A.R. 486) Dr. Powell concluded Werthy's symptoms were
20 consistent with at least a moderate level of clinical depression,
21 secondary to her physical pain. (A.R. 493) Werthy saw a doctor on
22 June 13, 2002, complaining that her depression had worsened. (A.R.
23 501) On August 29, 2002, she continued to complain of "chronic
24 depression." (A.R. 499) At a consultative examination on
25 November 12, 2002, Dr. Brown diagnosed Werthy with depression.
26 (A.R. 528) Werthy saw Dr. Butler on June 11, 2003, complaining
27 that her depression had been worse over the past two or three
28 months, partly due to her pain and sleep deprivation. (A.R. 532)

1 When Werthy saw Dr. Kim on September 6, 2007, to establish as
2 a new patient, she reportedly felt depressed, and stated her pain
3 was causing her not to be as happy as she used to be. Dr. Kim
4 diagnosed Werthy with a depressive disorder with insomnia, for
5 which she prescribed trazodone 50 mg (A.R. 623-24).

6 Thus, the record evidence establishes that Werthy has been
7 treated for depression since at least 1999, and the consultative
8 examiners diagnosed her with depression. In addition, treatment
9 notes are contrary to the ALJ's finding that Werthy has "taken
10 Trazadone [sic] to improve her sleep but it was not until January
11 2008 that she was prescribed an anti-depressant." (A.R. 26)
12 Werthy's doctors repeatedly noted they were prescribing Trazodone
13 for her depression, and both the Physicians' Desk Reference and
14 innumerable online sources indicate that Trazodone is prescribed
15 for the treatment of major depressive disorder. See, e.g.,
16 www.rxlist.com/oleptro-drug.htm (providing information on Trazodone
17 hydrochloride extended release tablets marketed under the name
18 "Oleptro"); www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000530/ (a web
19 site maintained by the National Institutes of Health, stating
20 "Trazodone is used to treat depression.").

21 Nevertheless, the treatment notes indicate Werthy's symptoms
22 of depression have been, for the most part, well controlled with
23 medication. Her treating sources did not urge her to undergo
24 psychotherapy or counseling for depression, merely continuing to
25 prescribe antidepressant medications themselves. The record
26 contains substantial evidence to support the ALJ's finding that
27 Werthy's mental impairments are not severe.

28 / / /

1 **2. Insomnia**

2 The ALJ noted Werthy "has complained of sleep disturbance and
3 her physician has diagnosed insomnia[.]" (A.R. 21) However, she
4 found Werthy's insomnia not to be severe, noting that Werthy has
5 been receiving treatment for the condition "and has reported that
6 she sometimes gets up but is able to return to sleep." (*Id.*)
7 Werthy argues the ALJ's conclusion that just because she *sometimes*
8 can return to sleep does not mean her insomnia would have no more
9 than a minimal effect on her ability to work. She argues that in
10 so finding, the ALJ essentially made her own independent medical
11 finding, something an ALJ is not permitted to do. Dkt. #15, p. 24
12 (citing *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996)). She
13 argues the ALJ failed to discuss her testimony and medical records
14 regarding her fatigue, and her need for frequent rest breaks and
15 naps. *Id.*

16 On January 7, 2002, Werthy saw a doctor complaining that her
17 daily pain was causing sleeplessness. (A.R. 500) On September 4,
18 2002, she was prescribed medication for insomnia. (A.R. 498) On
19 January 21, 2003, she complained that she was "losing sleep as a
20 result of her pain." (A.R. 533) She complained that she was not
21 sleeping well on June 11, 2003, and her sleep deprivation was
22 making her depression worse. (A.R. 532) On September 6, 2007,
23 Dr. Kim diagnosed Werthy with a depressive disorder with insomnia.
24 (A.R. 623-24)

25 Thus, there is no record evidence of Werthy's insomnia from
26 June 2003 until September 2007. Further, the record evidence does
27 not establish that the problem was "severe." The court finds the
28 ALJ did not err in concluding Werthy's insomnia was not severe.

1 **3. *Diarrhea and Headaches***

2 Werthy argues that in dismissing these impairments as non-
3 severe due to a lack of treatment notes, the ALJ ignored Werthy's
4 testimony that she could not afford to see a doctor for her
5 diarrhea, and she did, in fact, complain of headaches to Dr. Kim.
6 Dkt. #15, p. 24. Little discussion is required with regard to
7 these impairments. When Werthy saw Dr. Powell for evaluation in
8 August 2001, she stated she had four or more headaches a week.
9 (A.R. 486) In her hearing testimony, she again stated she has
10 headaches about four times a week, and her headaches have worsened
11 since her mother's death in 2005. She also stated, however, that
12 her headaches are under control within fifteen to twenty minutes
13 after she takes medication. (A.R. 645-46)

14 Other than these instances, there is nothing in the record
15 about Werthy's headaches. The court finds the record does not
16 contain substantial evidence that Werthy's headaches constituted a
17 severe impairment, and the ALJ did not err in finding the
18 impairment not to be severe.

19 Regarding her diarrhea, the *only* record evidence is Werthy's
20 testimony about her frequent problems. The ALJ observed, and the
21 court agrees, that Werthy's own testimony was internally incon-
22 sistent regarding this impairment, and the court finds the ALJ did
23 not err in finding Werthy's diarrhea not to be a severe impairment.

24
25 **4. *Feet, Arm, & Hand Limitations***

26 Werthy argues the ALJ "ignores the fact that a severity
27 determination is not determined by exclusively examining objective
28 evidence." Dkt. #15, p. 25 (citing *Smolen v. Chater*, 80 F.3d 1273

1 (9th Cir. 1996)). She further argues the ALJ erred in failing to
2 consider whether her severe degenerative disk disease would cause
3 pain radiating into her limbs. She notes the ALJ acknowledged
4 Dr. Ruleman's testimony that she would have limits on the use of
5 her feet, arms, and hands, and Dr. Kim's opinion that she would
6 have limitations. *Id.* (citing A.R. 21) Werthy argues the ALJ
7 improperly rejected Dr. Ruleman's testimony. *Id.*

8 Dr. Ruleman opined Werthy could "[d]efinitely" lift ten pounds
9 repeatedly. She could do reaching, but likely could not perform
10 other postural activities. (A.R. 643) Dr. Kim stated Werthy had
11 pain in her arms and feet. (A.R. 609) She opined Werthy would be
12 able to feel and handle without limitations, but would be limited
13 in her ability to reach, finger, and push/pull. She also opined
14 Werthy could lift up to ten pounds occasionally, over ten pounds
15 rarely, and she should never lift over ten pounds. However, from
16 Dr. Kim's treatment notes, it appears she based her opinion
17 regarding Werthy's lifting limitation on Werthy's subjective report
18 that she "gets pain in her arms with weights of 5 pounds." (A.R.
19 613)

20 Although the record contains some evidence regarding
21 limitations in Werthy's feet, arms, and hands, there is not
22 substantial evidence to support a finding that these impairments
23 are severe, to the extent they would significantly limit Werthy's
24 ability to do basic work activities. The court finds the ALJ did
25 not err in finding these impairments not to be severe.

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B. Residual Functional Capacity Determination

Werthy next argues the ALJ erred in failing to follow Social Security Ruling ("SSR") 96-8p, requiring consideration of *all* of Werthy's impairments, including those the ALJ found not to be severe, in determining Werthy's residual functional capacity ("RFC"). She further argues the ALJ failed to follow the SSR by considering and addressing all of the medical opinions. Specifically, Werthy asserts the ALJ failed to address Dr. Powell's diagnosis of a pain disorder, and the ALJ erred in rejecting Dr. Kim's opinions without providing specific reasons for doing so. Dkt. #15, pp. 26-28.

SSR 96-8p sets forth "the Social Security Administration's policies and policy interpretations regarding the assessment of [RFC] in initial claims for disability benefits under titles II and XVI of the Social Security Act[.]" SSR 96-8p (July 2, 1996). The RFC assessment "is an administrative finding of fact." *Id.* n.4. The ruling explains that ordinarily, the RFC assesses the *most* a claimant can do despite her limitations or restrictions, considering her ability "to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis . . . mean[ing] 8 hours a day, for 5 days a week, or an equivalent work schedule." *Id.* The RFC is based solely on the individual's medically-determinable impairments. *Id.*

In the Policy Interpretation statement following the ruling, the Agency explains:

The adjudicator must consider all allegations of physical and mental limitations or restrictions and make every reasonable effort to ensure that the file contains sufficient evidence to assess RFC. Careful consideration

1 must be given to any available information
2 about symptoms because subjective descriptions
3 may indicate more severe limitations or
restrictions than can be shown by objective
medical evidence alone.

4 In assessing RFC, the adjudicator must
5 consider limitations and restrictions imposed
6 by all of an individual's impairments, even
7 those that are not "severe." While a "not
8 severe" impairment(s) standing alone may not
9 significantly limit an individual's ability to
10 do basic work activities, it may - when
11 considered with limitations or restrictions
12 due to other impairments - be critical to the
outcome of a claim. For example, in combina-
13 tion with limitations imposed by an indi-
vidual's other impairments, the limitations
due to such a "not severe" impairment may
prevent an individual from performing past
relevant work or may narrow the range of other
work that the individual may still be able to
do.

13 *Id.*

14 "The RFC determination is based on 'all of the relevant
15 medical and other evidence,' including any statements about what
16 the claimant can still do provided by medical sources, whether
17 based on a formal medical examination or not, and descriptions and
18 observations of a claimant's limitation from his or her impairments
19 provided by the claimant or his or her family, neighbors, and
20 friends." *Beeson v. Astrue*, slip op., No. CV-09-1403-ST, 2011 WL
21 530794, at *7 (D. Or. Jan. 6, 2011) (quoting 20 C.F.R.
22 § 416.945(a)(3); citing SSR 96-8p).

23 A reviewing court will affirm an ALJ's RFC determination "if
24 the ALJ applied the proper legal standard and the decision is
25 supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d
26 1211, 1217 (9th Cir. 2005); accord *Frampton v. Astrue*, slip op.,
27 No. CV 08-14-00-PK, 2010 WL 373867, at *14 (D. Or Jan. 29, 2010)
28 (Mosman, J.). Here, although the ALJ explained why she found

1 several of Werthy's impairments not to be severe, there is no
2 indication she considered all of Werthy's impairments, even those
3 that are not "severe," in formulating her RFC assessment. Con-
4 sidered together, the impact of all Werthy's impairments on her
5 ability to sustain gainful employment could be much greater than
6 the impact of only her severe impairments.

7 Furthermore, the court finds the ALJ's treatment of the
8 handwritten statements from Werthy's two third-party witnesses to
9 be inappropriate in the context of this case. First, the ALJ
10 refused to allow Werthy's two witnesses, who were present and
11 available at the hearing, to testify, stating another hearing was
12 scheduled to begin. (A.R. 681) She invited Werthy to submit
13 statements from her two witnesses. (*Id.*) Then, when the witnesses
14 did submit statements, the ALJ failed to give them fair
15 consideration. She referred to the statements as being "allegedly"
16 by Messrs. Sandvig and Shea, noting, "Upon first impression, the
17 handwriting is remarkably similar as if the same person wrote these
18 brief statements." (A.R. 25) There is nothing in the record to
19 indicate the ALJ is a handwriting expert, competent to reach this
20 conclusion. As a lay person examining the two handwritten
21 statements, the court does not find the same degree of similarity
22 as did the ALJ. It was inappropriate for the ALJ to malign
23 statements from the very witnesses she refused to allow to testify
24 at the hearing, even if she chose to accord the statements little
25 weight based on their content or the witnesses' connection to the
26 claimant. "Disregard of the testimony of friends and family
27 members violates 20 C.F.R. § 404.1513(e)(2) (1991)." *Smolen v.*
28 *Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (citations omitted). An

1 ALJ has "a special duty to fully and fairly develop the record and
2 assure that the claimant's interests are considered," even when a
3 claimant is represented by counsel. *Id.* (internal quotation marks,
4 citation omitted). The ALJ's actions in this case with regard to
5 the third-party witnesses violated that duty.

6 Werthy further argues the ALJ improperly rejected the voca-
7 tional rehabilitation counselor's "opinion that plaintiff could not
8 work due to pain." Dkt. #15, p. 29. She argues that even if the
9 counselor's "opinion" was based solely on Werthy's subjective
10 complaints, it was improper for the ALJ to reject the counselor's
11 "opinion." *Id.* (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
12 Cir. 1993)). The court disagrees that the vocational rehabili-
13 tation counselor's letter rises to the level of an "opinion." The
14 letter merely confirmed that Werthy's file was being closed because
15 the counselor and Werthy concluded at a previous meeting that her
16 pain was interfering with her ability to find work. Without more,
17 neither the ALJ, nor the court, can make any determination about
18 the evidence or circumstances surrounding this conclusion. There
19 are no records from the counselor's office regarding Werthy's
20 attempts to look for work; types of work she applied for, if any;
21 or circumstances in which her pain significantly interfered with
22 her job search. The court finds the ALJ did not err in giving the
23 letter no weight.

24
25 ***C. Inaccurate Hypothetical;
26 Ability to Perform Semi-Skilled Work***

27 Werthy argues the ALJ erred in finding she can performs jobs
28 identified by the VE because the hypothetical question posed to the

1 VE failed to contain all of Werthy's limitations and impairments.
2 Dkt. #15, p. 30. A hypothetical question must reflect *all* of a
3 claimant's limitations and restrictions. *Bray v. Comm'r*, 554 F.3d
4 1219, 1228 (9th Cir. 2009) (citing *Russell v. Sullivan*, 930 F.2d
5 1443, 1445 (9th Cir. 1991)). "If an ALJ's hypothetical does not
6 reflect all of the claimant's limitations, then 'the [vocational]
7 expert's testimony has no evidentiary value to support a finding
8 that the claimant can perform jobs in the national economy.'" *Id.*
9 (quoting *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)).
10 Here, the court has found the ALJ erred in her RFC assessment, by
11 failing to consider the impact of all of Werthy's impairments, both
12 severe and not severe. The ALJ also erred in rejecting the third-
13 party witnesses' statements without adequate justification. The
14 ALJ's hypothetical question to the VE, although consistent with the
15 ALJ's RFC assessment, failed to include all of Werthy's limitations
16 and restrictions. The ALJ therefore could not rely on the VE's
17 testimony to make a determination that Werthy is able to work. See
18 *Jimerson v. Barnhart*, 51 F. App'x 208, 211 (9th Cir. 2002) (ALJ's
19 denial of benefits based on VE's opinion derived from incomplete
20 hypothetical is not supported by substantial evidence) (citing
21 *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002)).

22 Werthy further argues the ALJ erred in finding she can perform
23 semi-skilled work without identifying any transferable skills, in
24 violation of SSR 82-41 and 20 C.F.R. § 416.968. The ALJ found,
25 "Transferability of job skills is not material to the determination
26 of disability because using the Medical-Vocational Rules as a
27 framework supports a finding that the claimant is 'not disabled,'
28 whether or not [she] has transferable job skills." (A.R. 26,

1 citing SSR 82-41; 20 C.F.R. pt. 404, subp. P, appx. 2). Werthy
2 argues this finding was erroneous because the ALJ found Werthy
3 capable of performing two semi-skilled jobs that require
4 transferable skills, yet the ALJ failed to identify such skills.
5 Dkt. #15, pp. 30-31.

6 Although the ALJ identified two semi-skilled jobs she found
7 Werthy could perform, she also identified three unskilled jobs
8 Werthy could perform based on the ALJ's RFC determination. (A.R.
9 27) Because the court has found the ALJ's RFC determination to be
10 in error, the RFC determination cannot support the ALJ's finding
11 that Werthy can perform the unskilled jobs the ALJ identified.
12

13 ***D. Numbers of Available Jobs***

14 Werthy argues the ALJ erred in ignoring evidence from the
15 United States Department of Labor, the United States Department of
16 Commerce, and the State of Oregon, regarding "the lack of
17 documentation for numbers of jobs by DOT section at both the
18 national and regional levels." Dkt. #15, p. 31 (citing A.R. 298-
19 304). Werthy further argues the VE failed to provide a reasonable
20 basis for the numbers of each job he found Werthy could perform.
21 *Id.* (citing A.R. 677-78) Werthy's attorney objected to the VE
22 testifying about the numbers of jobs that exist in the economy
23 unless the VE brought to the hearing "valid, reliable data to
24 support [his] testimony." (A.R. 306, 676) Werthy relies on an
25 unpublished decision from the Western District of Virginia where
26 the court observed that regulations allowing an ALJ to take
27 administrative notice of the availability of jobs as detailed in
28 various governmental publications "does not in any respect resolve

1 the issue . . . [of] whether the job information presented by the
2 VE was statistically reliable in the first instance.” *King v.*
3 *Comm’r*, No. 7:06cv00490, 2007 WL 2471443, at *4 (W.D. Va. Aug. 24,
4 2007).

5 The ALJ and the VE relied on the *Dictionary of Occupational*
6 *Titles* (“DOT”) (see A.R. 676), “a publication recognized by the
7 Social Security regulations as a source of ‘reliable job infor-
8 mation.’” *Crane v. Barnhart*, 224 F. App’x 574, 578 (9th Cir. 2007)
9 (quoting 20 C.F.R. § 404.1566(d)(1) (2006)). The regulations
10 specifically provide that in determining whether work exists in
11 significant numbers in the national economy, the agency may take
12 administrative notice of the DOT, among other publications. 20
13 C.F.R. § 404.1566(d)(1). Although Werthy’s attorney submitted a
14 letter dated January 16, 2003, from the Director of the U.S. Census
15 Bureau, indicating the DOT “is no longer in use . . . [and] was
16 replaced by the Standard Occupational Classification (SOC)” (A.R.
17 302), counsel has offered no evidence that the DOT is no longer
18 used across the board by *all* governmental agencies. Indeed, before
19 an ALJ may rely on a VE’s testimony, the ALJ first must inquire as
20 to whether the testimony conflicts with information in the DOT.
21 *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007) (noting the
22 Third, Seventh, and Tenth Circuits are in accord). The ALJ
23 complied with that requirement here. (See A.R. 676)

24 The court finds the ALJ did not err in failing to consider
25 documentation submitted by Werthy about the lack of supporting data
26 for the numbers of jobs cited by the DOT.

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1 **VI. CONCLUSION**

2 The court has the power to enter a judgment affirming,
3 modifying, or reversing the Commissioner's decision, with or
4 without remand for further proceedings. 42 U.S.C. § 405(g). The
5 court has "discretion to remand a case either for additional
6 evidence and findings or to award benefits." *Smolen*, 80 F.3d at
7 1292 (citation omitted). If the record has been fully developed
8 and further administrative proceedings would not serve any useful
9 purpose, then the court may direct an immediate award of benefits.
10 *Id.*

11 In this case, however, the court finds further proceedings are
12 warranted. The case should be remanded with instructions to the
13 ALJ to consider the combination of *all* of Werthy's impairments,
14 including those deemed not severe, in assessing her RFC and in
15 formulating an appropriate hypothetical question for the VE; and to
16 give proper consideration to the third-party statements (and/or to
17 solicit testimony from those witnesses). I therefore recommend the
18 Commissioner's decision be reversed and the case be remanded for
19 further proceedings consistent with this opinion.

20
21 **VII. SCHEDULING ORDER**

22 These Findings and Recommendations will be referred to a
23 district judge. Objections, if any, are due by **September 19, 2011**.
24 If no objections are filed, then the Findings and Recommendations
25 will go under advisement on that date. If objections are filed,
26 then any response is due by **October 10, 2011**. By the earlier of
27
28

1 the response due date or the date a response is filed, the Findings
2 and Recommendations will go under advisement.

3 IT IS SO ORDERED.

4 Dated this 2nd day of September 2011.

5 /s/ Dennis J. Hubel

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Dennis James Hubel
7 Unites States Magistrate Judge
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